161 U.S. 91

TRANSCRIPT OF RECORD.

161—91

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 271.

THE UNION PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

JAMES CALLAGHAN.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED SEPTEMBER 11, 1893.

(15,390.)

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1 Pleas and proceedings in the United States circuit court of appeals for the eighth circuit at the May term, A. D. 1893, thereof, begun and holden at the United States court-house, in the city of St. Paul, Minnesota, on the first Monday in May, it being the first day of May, A. D. 1893, before the Hon. Walter H. Sanborn, circuit judge, and Hon. Oliver P. Shiras and Hon. Amos. M. Thayer, district judges.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest: JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Be it remembered that heretofore, to wit, on the 11th day of February, A. D. 1893, there was filed in the clerk's office of the United States circuit court of appeals for the eighth circuit, in pursuance to a writ of error directed to the circuit court of the United States for the district of Colorado, a transcript of record in a certain cause wherein The Union Pacific Railway Company was plaintiff in error and James Callaghan defendant in error; which said transcript of record is in the words and figures following, to wit:

2 In the Circuit Court of the United States, District of Colorado.

Pleas before the Hon. Moses Hallett, district judge of the United States circuit court for the district of Colorado, sitting at Denver, State of Colorado, at the regular May A. D. 1891 term thereof, begun and held at the court-house in the city of Denver, State of Colorado, on the fifth day (being the first Tuesday) of May, in the year of our Lord one thousand eight hundred and ninety-one.

Present: Hon. Moses Hallett, judge; John D. Fleming, U. S. district attorney; Albert H. Jones, U. S. marshal.

Attest: ROBERT BAILEY, *Clerk.*

Be it remembered, that heretofore and on, to wit, the 8th day of August, A. D. 1891, came James Callaghan, by Messrs. Hartsell & Patterson, his attorneys, and sued out of and under the seal of said court a writ of summons against The Union Pacific Railway Company, which said summons was duly served upon said company and filed in this court, with the return thereof showing said service; and thereupon and on, to wit, the same day the said plaintiff filed in said court his complaint, and the said complaint is in words and figures as follows, to wit:

UNITED STATES OF AMERICA, } ss :
District of Colorado, }

Complaint.

In the Circuit Court of the United States within and for the District of Colorado.

JAMES CALLAGHAN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY CO., Defendant.

Comes now the above-named plaintiff, by Hartzell & Patterson, his attorneys, and for cause of action against the said defendant company he alleges:

That plaintiff is, and at all of the times hereinafter mentioned was a citizen and resident of the State of Colorado.

2½ That the amount in controversy in this cause, exclusive of interest and costs, exceeds the sum and amount of two thousand dollars.

That the said defendant company is a corporation organized and existing under and by virtue of the acts of the Congress of *of* the United States, and that under its corporation it is, and has been for a number of years last past, engaged in the construction, ownership and operation of certain lines of railway between different points in different States of the United States.

That for the period of more than one year last past the said defendant company has been the owner and in the possession and actual operation of a certain line of steam railroad extending from the city of Denver, in Arapahoe county, Colorado, in a general southern direction through the State of Colorado and Territory of New Mexico, to some point in the State of Texas, the proper designation of which is unknown to plaintiff. That the said line of railway track so operated and maintained by the said plaintiff is what is known as a "broad gauge" steam railway, and that during the time aforesaid the said company has been operating trains thereon by means of steam locomotives, the said line passing in its course southward from the city of Denver through the city of Trinidad in Colorado to the town of Trinchera, south of the said city of Trinidad. That a short distance north of the said town of Trinchera, on the line of said railway, is located a certain bridge, crossing a gully or gulch, and that on or about the middle of the month of August, A. D. 1890, by reason of a certain rainstorm and freshet occurring in said vicinity, a large amount of water was caused to flow through the said gully or gulch across which said bridge extended, and by reason of the force and quantity of water so flowing through said gulch or gully by the said bridge and the foundation thereof had become greatly loosened and weakened, and the same became and was entirely insecure, unsafe and highly dangerous, and that such insecure, unsafe and dangerous condition of said bridge was readily apparent and visible to every person who might observe the same, or might have occasion to pass the same.

That almost immediately after the said bridge became in said dangerous, insecure and unsafe condition, the fact of the condition thereof was by certain persons called to the attention of the officers of the said defendant company having charge of said division of said railroad, and that the same was brought to the personal knowledge and notice of the superintendent and roadmaster acting for said division of said railroad company, and that on, to wit,
3 the 17th day of August, A. D. 1890, said superintendent and roadmaster of the said defendant company were personally present and inspected the said insecure, dangerous and unsafe condition of said bridge, and that it was then and there the duty of the said defendant company, and of the officers thereof, and the persons in charge thereof, and particularly of the said roadmaster and superintendent, to cause such steps to be taken as would effectually prevent any train from approaching or attempting to pass over the said bridge while it was in such dangerous condition, and it was at all times the duty of the said company to its employés, as well as to all other persons, to keep the said line of railway, and all of the bridges and appliances used in connection therewith, in a safe and secure condition, so that persons riding on the trains of the said defendant company on the said line of railway, should not be injured through any accident happening by reason of the insecure or unsafe condition of the said railroad, its road-bed, bridges or other erections or property used in connection therewith.

That during the said month of August, A. D. 1890, and up to the 18th day of August, plaintiff herein was in the employ of the said defendant company, and acting as its servant in the capacity of section foreman; that the section of said defendant company's road for which the said plaintiff was employed as foreman, and which was under his supervision in such employment, was located upon a certain branch line of said railway company's lines, known as a section of the "Maxwell branch" of said defendant company's system, and that the said branch of said railway upon which the section is located where plaintiff was employed is no part of the main line of the said defendant company, and is no part of the said line running from the said city of Trinidad south through the said town of Trinchera, as hereinbefore described, and is not directly connected therewith, except that the same is operated as a branch line and feeder thereof; and that on the afternoon of the 17th day of August aforesaid, the plaintiff was by the said defendant company, and its proper authorities in that behalf, ordered and instructed to proceed to the town of Sopris, together with other employés of the said defendant company, for the purpose of being conveyed by the said defendant company to that portion of its line of track which had been injured and weakened by the said freshet, which had weakened and injured the said bridge hereinbefore described; and that the same was away from and at a distance from the place upon the lines of the said defendant company where the plaintiff was employed and stationed; that said plaintiff, together with other employés of the said defendant company, proceeded to the

said town of Sopris, where they were taken upon a train of
4 the said defendant company, under the orders of the said defendant company, to the city of Trinidad; and that at the city of Trinidad aforesaid, the said plaintiff, together with other employés of the said defendant company, was, by the orders of the said defendant company, placed on board a certain work or construction train of the said defendant company, and manned by the servants of the said defendant company, and on the evening of the said 17th day of August the said plaintiff, together with the said other employés, were taken from the said town of Trinidad upon the said line of the defendant company hereinbefore described towards the town of Trinchera, said plaintiff having been placed under the charge, authority and control of other employés of the said defendant company for the doing of certain special work, disconnected from the employment and duties for which he had been employed by the said defendant company, in connection with the repair of the road, track and bridge of the said defendant company, so injured by the said storms and washouts.

That at about the hour of 7 o'clock in the morning of the 18th day of August aforesaid, the said train whereon the said plaintiff was riding under the orders and instructions of the said defendant company, came to and approached a certain section-house of the said defendant company and located about 3 miles north of the said bridge which has been hereinbefore described as being in said dangerous and unsafe condition; and that as the said train approached the said section-house the same was flagged or a signal was given to the said train to stop by one Martin Callahan, and that in obedience to such signal said train slackened its speed, and it was about stopping, but that the conductor in charge of said train, and acting in that behalf for the said defendant company, signalled the engineer in charge of the engine on said train to go ahead, and the said train proceeded again in its directions southward and towards the said dangerous, unsafe and insecure bridge, and that the said plaintiff being on the said train, had no knowledge or notice of the condition of the road-bed or bridges or track of the said defendant company, but simply acting under the advice and orders and instructions of the said defendant company, and had no control, authority or voice in the management or control of the said train upon which he was riding; and that after proceeding southward in the direction of the town of Trinchera, and without any other notice, warning or signal of any kind, character or description whatsoever, the said train came to and upon the said bridge which was in such dangerous, unsafe and insecure condition, and by reason of the dangerous condition of
said bridge and the weakness thereof, which was known to
5 the officers of the said defendant company as aforesaid, the same gave way, broke and collapsed, by means whereof the said train whereon the plaintiff was riding under the orders and instructions of the said defendant company, was precipitated into the said gully or gulch over which the said bridge had been erected, and as the result thereof the said plaintiff was thrown with great force and violence from the said train, and was by the said train and

the fall thereof greatly crushed, bruised and injured; that as the result of such fall and accident to said train, the plaintiff sustained a compound fracture of his right leg between the ankle and knee, and as the result thereof, the plaintiff was compelled to remain in the hospital for a period of three months after the said accident; and that he has been totally and entirely disabled from performing any duties or pursuing any occupation requiring any physical exertion whatsoever since the happening of the said accident, and that plaintiff is by his physicians informed that it is doubtful when he will be able to use his said limb which was fractured and broken, if he ever shall be able to use the same. That he is compelled to go about entirely upon crutches, and is unable to touch the said limb to the ground or floor for any purpose whatsoever. That during all of said time plaintiff has suffered great pain and agony as the result of the said accident and the injuries so received by him. That the plaintiff has no trade or profession or occupation from which to support himself except manual labor, and at the time of the happening of the said accident he was receiving from the said company the sum of $60.00 per month, and that during the period of five years last passed he has earned by his manual labor from $60.00 to $125.00 per month in the different positions in which he has been employed.

That plaintiff has a wife and family of children dependent upon him and his exertions for their maintenance and support; that since the happening of the said accident he has been totally unable to earn any sum of money to contribute to the support of himself or his said family.

Plaintiff charges the truth to be that the said accident and injury to the plaintiff was caused from the gross carelessness, negligence and recklessness of the said defendant company, and its officers and employés in charge of its said line of railway track and bridges, and the negligence, carelessness and recklessness of the officers in charge of and managing its said train. That the said superintendent and roadmaster of the said defendant company were reckless, negligent and careless in this, that they failed to take such precautions, and cause such precautions to be taken by others, as would pre-
6 vent any train of cars from crossing, or attempting to cross, the said bridge, while the same was in such dangerous and insecure condition; that they utterly and wholly failed to take any precaution whatsoever in the premises; that the said plaintiff was riding upon the said train of the said defendant company, as a passenger of the said defendant company, and wholly disconnected from his duties and services in connection with his employment by the said defendant company, and that the said accident resulted and was caused entirely by the negligence, carelessness and recklessness of the said officers of the said defendant company, together with the conductor and engineer in charge of the train on which plaintiff was riding, and that in and about all of the said matters and transactions, the said plaintiff was in the exercise of all due, proper and ordinary care and caution and prudence, and was guilty of no act of

omission which might or could in any way or manner contribute to the happening of the said injury to him.

That by reason of the injuries so received by plaintiff, he was compelled to pay out, and did so pay out and expend, in and about doctors' bills and bills for medicines, nursing, etc., the sum of one hundred dollars. That he has been injured by reason thereof in his person, and in the suffering inflicted upon him by reason of such injuries, in the sum of $15,000.

Wherefore, plaintiff demands judgment against the said defendant for the said sum of one hundred dollars so paid out and expended by him for doctors, nursing and other expenses connected with the said injuries; for the said sum of $15,000, as and for his damages suffered in said behalf, and for the costs of this action.

HARTZELL & PATTERSON,
Attorneys for Plaintiff.

STATE OF COLORADO, } ss:
County of Arapahoe, }

James Callaghan, being first duly sworn, upon his oath deposeth and says:

That he is the plaintiff named in the above-entitled cause; that he has read over the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters and things therein stated on information and belief, and as to such matters and things, he believes the same to be true.

JAMES GALLAGHAN.

Subscribed and sworn to before me this 8th day of July, A. D. 1891.

My commission expires Oct. 24, 1894.

[SEAL.] THOS. D. ADAMS,
Notary Public.

7 Indorsed. 2680. United States circuit court. James Callaghan *vs.* The Union Pacific Railway Company. Complaint. Filed Aug. 8, 1891. Robert Bailey, clerk U. S. circuit court. Hartzell & Patterson, att'ys for pl'ff.

In the Circuit Court of the United States for the District of Colorado.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

Complaint Filed in the Clerk's Office this 8th Day of August, A. D. 1891.

JAMES CALLAGHAN, Plaintiff,
versus
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

The President of the United States of America to the Union Pacific Railway Company, Greeting:

You, and each of you, are hereby notified that an action has been brought in said court by James Callaghan, plaintiff, against you,

as defendant, to recover the sum of $15,100, due from you, the said defendant, to the said plaintiff, as damages for injuries sustained by plaintiff while in the employ of the defendant, on the 18th day of August, 1890, near the town of Trinchera, in said district, as more fully set forth and described in the complaint herein, to which reference is here made.

You are hereby required to appear and demur or answer to the complaint filed in said action in said court, within ten days (exclusive of the day of service) after this summons shall be served on you, if such service shall be made within the county of Arapahoe, otherwise within forty days from the day of service; and if you fail so to do, the said plaintiff will take judgment against you by default, according to the prayer of the said complaint, and will apply to the court for the relief demanded therein.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of the said [SEAL.] circuit court, at the city of Denver, in said district, this 8th day of August, A. D. 1891, and of the Independence of the United States the 116th year.

ROBERT BAILEY, *Clerk.*

8 *Proof of Service.*

UNITED STATES OF AMERICA, *District of Colorado,* } ss:

DENVER, *August 17th, A. D.* 1891.

I hereby certify that I received the within writ on the 9th day of August, A. D. 1891, and that I have personally served the same upon the said defendant, The Union Pacific Railway Company, by delivering to R. J. Duncan, manager Colorado Division of Union Pacific Rwy. Company, personally, a true copy of the within writ, at the time and place as follows: As to the Union Pacific Railway Company, at Denver, county of Arapahoe, on the 15th day of August, A. D. 1891.

This writ, therefore, returned executed as the law directs, this 17th day of ——, A. D. 188–.

A. H. JONES, *Marshal,*
By A. W. BROWN,
Deputy Marshal.

Marshal's Fees.

Service, 1 defendant, at $2	$2 00
Mileage, 2 miles at 6c., going only	12
Copy of complaint	2 00
Total	$4 12

Indorsed. Gen. No. 2680. Circuit court of the United States for the district of Colorado. James Callaghan, plaintiff, *versus* The Union Pacific Railway Company, defendant. Summons. Filed

this 17th day of August, A. D. 1891. Robert Bailey, clerk. Hartzell & Patterson, of Denver, attorneys for plaintiff.

In the Circuit Court of the United States, District of Colorado.

Demurrer to Complaint.

JAMES CALLAGHAN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant in the above-entitled action, by Teller & Orahood, its attorneys, and demurs to the plaintiff's complaint herein, and for cause of such demurrer, alleges that said complaint does not state facts sufficient to constitute a cause of action against this defendant.

TELLER & ORAHOOD,
Attorneys for Defendant.

9 Indorsed. No. 2680. Circuit court. James Callaghan *vs.* The Union Pacific Railway Company. Demurrer to complaint. Filed Aug. 25, 1891. Robert Bailey, clerk U. S. circuit court. Teller & Orahood, attorneys for def't.

Action for Damages.

JAMES CALLAGHAN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2680.

At this day comes the said plaintiff, by W. H. Bryant, Esqr., his attorney, and the said defendant by W. Teller, Esqr., its attorney, also comes.

And the demurrer to the complaint coming on now to be heard, is argued by counsel, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said demurrer be overruled.

In the Circuit Court of the United States, District of Colorado.

Answer.

JAMES CALLAGHAN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant.

Now comes the defendant in the above-entitled action, and for answer to the plaintiff's complaint herein:

Denies that the defendant, at the time stated in said complaint, or at any other time, was the owner, or in the possession or opera-

tion of the line of railroad, described in said complaint, or any part thereof.

This defendant, further answering, alleges that it has not and cannot obtain sufficient knowledge or information upon which to base a belief, as to whether or not there was a certain bridge crossing a gulley or gulch, as stated in said complaint; nor as to whether or not by reason of rain, storm or freshet, or a large amount of water flowing through the said gulley, the said bridge, if any there was, was undermined, or the foundation thereof loosened or weakened; nor as to whether or not the same was insecure, unsafe or dangerous, as in said complaint stated; nor as to whether or not if the same was unsafe or dangerous, the same was readily apparent or visible, as stated in said complaint and therefore denies the same.

10 Denies that the dangerous, insecure or unsafe condition of said bridge, if any there was, was called to the attention of the officers of the defendant company, having charge of said railway; and denies that the officers of the defendant company had charge thereof; denies that the same was brought to the personal knowledge or notice of the officers of the defendant company mentioned in said complaint or any other officers of the defendant company; denies that such officers were personally present, or inspected said bridge, as stated in said complaint; denies that any of the officers of the defendant company failed or neglected to perform any duty devolving upon such officer-; denies that it was the duty of the defendant company to keep the said line of railway, or the bridges or appliances used in connection therewith, in a safe and secure condition, as stated in said complaint, or otherwise; denies that at the time mentioned in said complaint, or at any other time, the plaintiff was in the employ of the defendant company, or acting as its servant in any capacity whatever; denies that the said railroad, called the "Maxwell branch," in said complaint, was a part of the defendant company's system or railway, and denies that the defendant company owned or operated the same, or any part thereof, as in said complaint stated, or otherwise; denies that the defendant, or its proper authorities, ordered or instructed the plaintiff to proceed to the town of Sopris, or elsewhere, together with other employés of the defendant company, or any one else, for the purposes stated in said complaint, or any purposes whatever.

Defendant, further answering, alleges: That it has not and cannot obtain sufficient knowledge or information upon which to base a belief, as to whether or not plaintiff, together with other employés of the defendant company, or otherwise, proceeded to the town of Sopris, as stated in said complaint, nor as to whether or not they were taken upon the train, as stated; but if they were so taken on the train, defendant denies that it was the train of defendant company, or under its orders. Denies that plaintiff, together with other employés of the defendant company, were placed, by the orders of defendant company, on board a work or construction train of the defendant company; denies that if there was such a train, it was manned by the servants of defendant company, and denies that

they were taken to the town of Trinidad, or elsewhere, on the line of defendant company; denies that plaintiff was placed under the charge, authority or control of other employés of the defendant company for the purposes stated in said complaint, or otherwise.

Defendant, further answering, alleges, that it has not and
11 cannot obtain sufficient knowledge or information upon which to base a belief, as to whether or not, at the time mentioned in said complaint, or at any other time, the train whereon plaintiff was riding came to or approached a section-house, as stated in said complaint; nor as to whether or not the said train was flagged, or a signal was given to stop, as stated in said complaint, or otherwise; nor as to whether or not the train slackened its speed, as stated in said complaint; nor as to whether or nor the conductor in charge of said train signaled the engineer to go ahead; nor as to whether or not the said train did go ahead; nor as to whether or not said train came upon said bridge; nor as to whether or not said bridge was in a dangerous, unsafe or insecure condition; nor as to whether the same gave way, broke or collapsed, as stated in said complaint; nor as to whether or not the said train was precipitated into said gulley or gulch, over which the said bridge was erected; nor as to whether or not the plaintiff was thrown from said train, as stated in said complaint; nor as to whether or not he was crushed, bruised or injured, as stated in said complaint; nor as to whether or not he was compelled to remain in the hospital, as stated in said complaint, or otherwise; nor as to whether or not he has been, or is, disabled from performing duties, or pursuing any occupation, physical exertion, as stated in said complaint, or otherwise; nor as to whether or not he will be able to use his limb; nor as to whether or not he is compelled to go upon crutches, or is unable to touch the said limb to the ground; nor as to whether or not he has suffered pain or agony as the result of said accident, as stated in said complaint; nor as to whether or not he has a trade, profession or occupation, as stated in said complaint; nor as to whether he was receiving the compensation per month stated in said complaint, or otherwise. Defendant therefore denies each and all of the allegations of the complaint in that behalf.

Defendant, further answering, denies, that said section-house, if any there was, was the section-house of the defendant company; denies that the conductor in charge of said train was acting for or on behalf of the defendant company; denies that plaintiff had no knowledge or notice of the condition of the road-bed, bridges or track, as stated in said complaint, and denies that the said bridges, road-bed and track were owned or operated by the defendant company.

Denies that plaintiff was acting under the advice or orders or instructions of the defendant company, or its officers, and denies that the dangerous and unsafe condition of said bridge, if any there was, was known to the officers of the defendant company, and denies that the plaintiff was riding on said train under the orders and instructions of the defendant company.

12 Defendant, further answering, denies that the said acci-

dent and injury, if any there were, were caused by the carelessness, negligence and recklessness of the defendant company, or of its officers or employés, in charge of said line of railway track and bridges, or otherwise; or by the negligence, carelessness or recklessness of the officers in charge of, or who manned its train, or otherwise; denies that any superintendent or road-master of the defendant company was reckless, negligent or careless, in the manner stated in said complaint, or otherwise; denies that plaintiff was riding upon said train as a passenger of the defendant company; denies that he was riding upon said train in any other capacity than as an employé, and denies that his being on said train was disconnected from his duties and services in connection with his employment, and denies that he was employed by the defendant company; denies that said accident, if any there was, resulted or was caused by the negligence, carelessness or recklessness of any officer or officers of the defendant company, or of any conductor or engineer in the employ of the defendant company.

And on information and belief defendant denies that plaintiff was in exercise of due, proper or ordinary care, caution or prudence, and that he did not contribute to the happening of the injury to him.

Defendant, further answering, alleges, that it has not and cannot obtain sufficient knowledge or information upon which to base a belief, as to whether or not the plaintiff was compelled to, or did pay out and expend the sum of one hundred (100) dollars, or any other sum as stated in said complaint; nor as to whether or not he has been injured, as stated in said complaint, or otherwise, and therefore denies the same. Denies that the plaintiff is entitled to any judgment whatever against this defendant, as prayed for in said complaint or otherwise.

II.

This defendant, further answering, and without in any way or manner waiving any of the denials aforesaid, alleges:

That the said plaintiff, if injured as stated in his said complaint, was injured by and through his own negligence and want of care, and not by or through any act, negligence or want of care on the part of this defendant.

III.

This defendant, further answering, and without in any way or manner waiving any of the denials aforesaid, alleges:

13 That the plaintiff, if he received the injuries, stated in said complaint, was so injured by, through or on account of the negligence and want of care of his co-employés engaged in the same general line of employment, and not by, through or on account of any act, negligence or want of care on the part of this defendant.

Wherefore: Defendant prays to be dismissed, and to recover its costs in this behalf expended.

TELLER & ORAHOOD,
Attorneys for Defendant.

they were taken to the town of Trinidad, or elsewhere, on the line of defendant company; denies that plaintiff was placed under the charge, authority or control of other employés of the defendant company for the purposes stated in said complaint, or otherwise.

Defendant, further answering, alleges, that it has not and
11 cannot obtain sufficient knowledge or information upon which to base a belief, as to whether or not, at the time mentioned in said complaint, or at any other time, the train whereon plaintiff was riding came to or approached a section-house, as stated in said complaint; nor as to whether or not the said train was flagged, or a signal was given to stop, as stated in said complaint, or otherwise; nor as to whether or not the train slackened its speed, as stated in said complaint; nor as to whether or nor the conductor in charge of said train signaled the engineer to go ahead; nor as to whether or not the said train did go ahead; nor as to whether or not said train came upon said bridge; nor as to whether or not said bridge was in a dangerous, unsafe or insecure condition; nor as to whether the sane gave way, broke or collapsed, as stated in said complaint; nor as to whether or not the said train was precipitated into said gulley or gulch, over which the said bridge was erected; nor as to whether or not the plaintiff was thrown from said train, as stated in said complaint; nor as to whether or not he was crushed, bruised or injured, as stated in said complaint; nor as to whether or not he was compelled to remain in the hospital, as stated in said complaint, or otherwise; nor as to whether or not he has been, or is, disabled from performing duties, or pursuing any occupation, physical exertion, as stated in said complaint, or otherwise; nor as to whether or not he will be able to use his limb; nor as to whether or not he is compelled to go upon crutches, or is unable to touch the said limb to the ground; nor as to whether or not he has suffered pain or agony as the result of said accident, as stated in said complaint; nor as to whether or not he has a trade, profession or occupation, as stated in said complaint; nor as to whether he was receiving the compensation per month stated in said complaint, or otherwise. Defendant therefore denies each and all of the allegations of the complaint in that behalf.

Defendant, further answering, denies, that said section-house, if any there was, was the section-house of the defendant company; denies that the conductor in charge of said train was acting for or on behalf of the defendant company; denies that plaintiff had no knowledge or notice of the condition of the road-bed, bridges or track, as stated in said complaint, and denies that the said bridges, road-bed and track were owned or operated by the defendant company.

Denies that plaintiff was acting under the advice or orders or instructions of the defendant company, or its officers, and denies that the dangerous and unsafe condition of said bridge, if any there was, was known to the officers of the defendant company, and denies that the plaintiff was riding on said train under the orders and instructions of the defendant company.

12 Defendant, further answering, denies that the said acci-

dent and injury, if any there were, were caused by the carelessness, negligence and recklessness of the defendant company, or of its officers or employés, in charge of said line of railway track and bridges, or otherwise; or by the negligence, carelessness or recklessness of the officers in charge of, or who manned its train, or otherwise; denies that any superintendent or road-master of the defendant company was reckless, negligent or careless, in the manner stated in said complaint, or otherwise; denies that plaintiff was riding upon said train as a passenger of the defendant company; denies that he was riding upon said train in any other capacity than as an employé, and denies that his being on said train was disconnected from his duties and services in connection with his employment, and denies that he was employed by the defendant company; denies that said accident, if any there was, resulted or was caused by the negligence, carelessness or recklessness of any officer or officers of the defendant company, or of any conductor or engineer in the employ of the defendant company.

And on information and belief defendant denies that plaintiff was in exercise of due, proper or ordinary care, caution or prudence, and that he did not contribute to the happening of the injury to him.

Defendant, further answering, alleges, that it has not and cannot obtain sufficient knowledge or information upon which to base a belief, as to whether or not the plaintiff was compelled to, or did pay out and expend the sum of one hundred (100) dollars, or any other sum as stated in said complaint; nor as to whether or not he has been injured, as stated in said complaint, or otherwise, and therefore denies the same. Denies that the plaintiff is entitled to any judgment whatever against this defendant, as prayed for in said complaint or otherwise.

II.

This defendant, further answering, and without in any way or manner waiving any of the denials aforesaid, alleges:

That the said plaintiff, if injured as stated in his said complaint, was injured by and through his own negligence and want of care, and not by or through any act, negligence or want of care on the part of this defendant.

III.

This defendant, further answering, and without in any way or manner waiving any of the denials aforesaid, alleges:

13 That the plaintiff, if he received the injuries, stated in said complaint, was so injured by, through or on account of the negligence and want of care of his co-employés engaged in the same general line of employment, and not by, through or on account of any act, negligence or want of care on the part of this defendant.

Wherefore: Defendant prays to be dismissed, and to recover its costs in this behalf expended.

TELLER & ORAHOOD,
Attorneys for Defendant.

STATE OF COLORADO, } ss:
County of Arapahoe, }

Harper M. Orahood, being first duly sworn, on his oath deposes and says:

That he is one of the attorneys for defendant in the above-entitled action; that said defendant is a corporation, for which reason affiant makes this verification in its behalf; that affiant has read the foregoing answer, and knows the contents thereof, and that the same is true to the best knowledge and belief of this affiant.

HARPER M. ORAHOOD.

[SEAL.] Subscribed and sworn to before me this 14th day of January, 1892.

My commission expires January 25th, 1893.

C. M. SPERRY,
Notary Public.

Indorsed: No. 2680. Circuit court. James Callaghan *vs.* The Union Pacific Railway Company. Answer. Filed Jan. 14, 1892. Robert Bailey, clerk, U. S. circuit court. Teller & Orahood, attorneys for the Union Pacific Railway Company.

Action for Damages.

JAMES CALLAGHAN
vs. } 2680.
THE UNION PACIFIC RAILWAY COMPANY.

At this day comes the said plaintiff, by W. H. Bryant, Esqr., his attorney, and the said defendant, by Willard Teller, Esqr., its attorney, also comes.

And thereupon comes a jury, to wit: Henry Denes, Montague W. Robinson, John W. Day, Edward Davis, William G. Russell,
14 Z. C. Plummer, J. B. Hiskey, Henry L. Prentice, William H. Seeds, Henry Babcock, Frederick W. Pierson, Ernest Stahl, twelve good and lawful men, and they are duly selected and tried, impaneled and sworn to well and truly try the matter at issue herein joined between the parties to this cause, and a true verdict render according to the evidence.

And thereupon comes the evidence, the hearing of which is continued to the hour of adjournment.

And the said jurors being now each duly cautioned by the court, not to converse among themselves, or with others touching this cause, or the matter at issue herein or the evidence heard, or any part thereof, nor to listen to such conversation by others, are permitted to retire to meet the court at its next incoming.

Action for Damages.

JAMES CALLAGHAN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2680.

At this day comes again the said parties by their attorneys, respectively, and the said jurors being now all here present and in the jury-box, the trial herein is resumed.

And the said jurors having heard the evidence produced herein and the instructions of the court, retire to their room under charge of a sworn bailiff to consider of their verdict.

And afterwards and on this day come again the said jurors and on their oaths to say, they find for the plaintiff, James Callaghan, and assess the damages at four thousand five hundred dollars ($4,500).

Action for Damages.

JAMES CALLAGHAN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2680.

At this day comes the said plaintiff, by W. H. Bryant, Esqr., his attorney, and the said defendant, by Willard Teller, Esqr., its attorney, also comes.

And the motion for a new trial herein, having heretofore come on to be heard, and having been argued by counsel and by the court taken under advisement, and the court being now sufficiently advised in the premises, it is ordered by the court, for good and sufficient reasons to the court appearing, that the said motion be denied.

Wherefore, it is considered by the court that judgment be entered upon the verdict of the jury herein in favor of the said plaintiff and against the said defendant for the said sum of forty-five hundred dollars ($4,500), and the said plaintiff's costs to be taxed.

And day until forty (40) days from this day is allowed the said defendants within which time to file a bill of the exceptions reserved by it upon the trial of the issues herein joined.

Action for Damages.

JAMES CALLAGHAN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2680.

On this, 9th day of November, A. D. 1892, the same being one of the regular juridical days of the November term, A. D. 1892, of said court, there being present the Honorable Moses Hallett, district judge.

It is considered by the court that the said plaintiff do have and recover of and from the said defendant four thousand five hundred dollars ($4,500), his damages, by occasion of the premises in his complaint mentioned in form aforesaid assessed, and his costs by him in this behalf laid out and expended to be taxed and have execution therefor.

Action for Damages.

JAMES CALLAGHAN
vs.
THE UNION PACIFIC RAILWAY COMPANY. } 2680.

At this day comes the said plaintiff, by W. H. Bryant, Esqr., his attorney, and the said defendant, by Willard Teller, Esqr., its attorney, also comes.

And thereupon it is ordered by the court that supersedeas bond upon writ of error herein, shall be in the sum of six thousand dollars ($6,000).

In the Circuit Court of the United States, District of Colorado.

Bill of Exceptions.

JAMES CALLIGHAN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 2680.

Be it remembered: That on this 25th day of May, A. D. 1892, this cause coming on to be tried; the plaintiff appearing by Messrs. Hartzell and Patterson, his attorneys, and the defendant appearing by Messrs. Teller, Orahood & Morgan, its attorneys.

16 Thereupon, a jury was impaneled and sworn to try said cause.

The plaintiff, to sustain the issues on his part called as a witness MARTIN CALLAGHAN, who being first duly sworn, gave evidence tending to show that he had been section foreman for the defendant for three years, and that he was working on the section south from the town of Adair on the line of defendant's road. It extended about seven and one-half miles south of Adair, and three miles south of Trinchera. The witness also gave evidence tending to show that during the month of August, 1890, there were many washouts on the road, the first occurring on the 13th or 14th, and that they were working on the road on Saturday and Sunday; they were working under directions of defendant's roadmaster and its superintendent down as far as Trinchera, and that Trinchera was about half a mile beyond the place where accident in this case occurred; that at Trinchera the main track was washed out, and the side track and the wye; that the roadmaster, A. E. Holloway, was there, and also the superintendent of the defendant, F. E. Bissell, was there; that Adair is north of Trinchera, five miles on the

line of the road, and going from Trinchera to Adair, you would have to pass over the bridge where the accident occurred; that he was sent by Holloway to Adair to get track wrenches &c., and noticed the condition of the bridge when he went over it; there was about 15 feet of the dump washed away from each end of it—not safe for trains to go over it; that when he returned to Trinchera, he told Mr. Holloway about its being washed out, and Holloway said: "We know about that." That on Sunday night he went home to Adair where he lived; that on Monday morning he saw the train going down the road shortly before seven o'clock; that he went out and flagged it with his hand, having no other flag; the train slowed up, but did not come to a stop; that he next saw the train when it was a wreck at the bridge.

The witness then gave evidence tending to show the condition of his brother, whom he found at the bridge, having been injured in the accident, &c. That he saw his brother after the accident for six or eight months, he having laid in the hospital in Denver; that the accident occurred either the 17th or 18th of August.

The witness also stated, that you could see the bridge coming down on the train for about a quarter of a mile; that there is a curve in the cut north of the bridge, and that you came to the bridge through this curve and cut.

17 On cross-examination the witness stated, that from the 13th of August, there had been a series of washouts and rains all along the line for a good many miles; that between Thursday morning and Monday morning, when the accident happened, there had been this continuous series of washouts, extending from Adair to Folsom, say 50 or 60 miles; that the last train that was run over the road was an engine and caboose, that came over Saturday morning and went south; that there had been at least three days prior to Monday that regular trains had not run over the road, and the only one that had run over was the engine and caboose that went south and passed over the bridge, and that was Saturday morning. This engine and caboose went out to repair washouts; that with the exception of the train to repair washouts, there were no trains for three days that witness knew of; that in passing over the bridge Sunday afternoon, witness noticed its condition, and that it was unsafe; the dirt was washed away from the approach of the bridge 15 or 20 feet; that the bridge was a three-span bridge, sixteen feet spans; that the dump or approach to the bridge at this end was washed out about 15 feet, and the same as to the other end, and that the same was plain to be seen, and that witness saw it; witness also stated that anybody could see it by looking and observing. That he went over this ground three or four o'clock in the afternoon on Sunday.

Witness also stated that it was his duty as section foreman when he is left on the section, on finding a bridge in bad condition, to guard it, and not let anything run into it.

Q. How did you guard it?

A. Why, we were supposed to use a red flag, torpedoes; red lights at night if necessary.

Q. When you used the red flag, where did you set it?

A. It is supposed to be set in the center of the track, or else they have a man stay with it.

The witness further stated that he had five or six men under him at that time, two at Adair, and the balance working at Trinchera; witness also stated that there was a flag up when he went by it in the afternoon; that he took it up, set it down again and then went on; the flag was in the center of the track—it was a red flag; that one George Brooks put it there, one of witness' men; it was put there for the purpose of stopping the train in case of danger; that the flag was about three or four telegraph poles north of the bridge.

Witness also stated that he thought the distance of telegraph
18 poles apart is thirty or thirty-five poles to the mile—maybe more or maybe less. The witness further stated that he did not think the flag was set enough north—that it should have been set, according to the rules, half a mile north, but witness set the flag back in the same place where he found it.

Witness further admitted that it was his duty to see that the flags were properly set; that he put no torpedoes upon the track because he had none with him; that there were torpedoes at Adair, and that he put none on the track; that he didn't know what was the reason he didn't move the flag.

Q. If you had thought it was dangerous you would have moved it, would you not?

A. Certainly, if I thought there was anything coming out I would have moved it, if there was anything coming from Trinidad.

That the flag was one usually used for flagging trains.

The witness further stated that when he flagged the train at Adair it was running fifteen or twenty miles an hour, and thinks they slowed down to about four miles an hour; that he said nothing to anybody on the train; that he flagged them with his hand because the red flag usually used was down at the bridge; that he gave the signals to stop down at Adair when they were two or three telegraph poles away from them; that the train consisted of box cars next to the caboose and some flat cars loaded with timber; that the box cars did not go into the ditch, but the three flat cars and the coal car were off.

On redirect examination, the witness gave evidence tending to show that he was under the orders of the roadmaster when the roadmaster was present. That he did not tell the men on the train about the bridge because the train did not slow up enough.

PATRICK CALLAGHAN, a witness called for the plaintiff, and being first duly sworn, stated that he was a brother of the plaintiff, and his business was section foreman for the Union Pacific Railway Co.; that he was working at the time this accident occurred for this company; that his section extended from Adair north; that he remembered the rains and washouts stated by his brother; that he was there at Trinchera Sunday evening, and saw Mr. Holloway and Mr. Bissell there; saw them walk over the bridge and examine it about

four o'clock in the afternoon, and then all walked back to Trinchera; the bridge is half a mile from Trinchera; the witness went
19 over the bridge on a hand car in the afternoon and that the bridge was not safe; that he went to Adair; saw the train the next morning as described by the other witness; the train slowed up and then ran on without stopping.

Witness also gave evidence tending to show that he followed on after the train, and saw his brother, who was suffering, &c., and that he has suffered much since; that at the time of the accident they had taken all his men off the section except two.

On cross-examination, the witness stated that his duties were, and the duties of all section foremen were, if they found anything wrong with the track to repair it and report it, go to the first office there is and report it by wire, and protect it until further orders; by protection he meant leaving men there, if necessary, setting up flags by day and lights by night, sometimes using torpedoes; that he passed over this bridge about seven o'clock in the evening, or later Sunday evening, with his brother Martin, the former witness; that they knew at the time that the bridge was unsafe; that he saw a flag in the center of the track, but couldn't tell how far it was from the bridge; that they left the flag just where it was in the middle of the track; the size of the flag was the ordinary size; that he thought the flag was sufficient to do the business, and that if he thought it was insufficient, it would have been his duty to put a man there to guard it, but he left it standing. Witness stated that he did not attempt to flag the train, because one flagman was enough; that the flagman who did flag the train, did it with his hand in the ordinary way; that the engineer could have seen a signal; that he was in a position to — a signal; that he answered the signal by slowing down, but he didn't slow down so as to nearly get to a stop until 500 or 600 feet by the station; that he made no other demonstration; that he didn't use any red flag at that time; didn't use any red flag, because if there was any flag it was in the tool-house, and there was not any time to get it; that the company furnished this road with flags for the purpose of flagging trains and warning of danger.

Q. What is the engineer's duty in respect to it when he observes one of those red flags in the middle of the track?

A. He is supposed to stop.

The witness then gave evidence tending to show that it was the duty of an engineer to stop to learn what was the matter.

The plaintiff then introduced as a witness, GEORGE BROOKS, who, being first duly sworn, gave evidence tending to show that he was a laborer engaged at the time of the accident at Adair, work-
20 ing for the defendant; remembered the washouts, and was working on a section running from Adair to three miles south of Trinchera. Witness also gave evidence tending to show that there had been very heavy rains Saturday night about midnight and Sunday morning; that he started out early Sunday morning;

got a mile from the house and the water was still high; the bridge was washing out and he put the danger signal up; that he proceeded on his journey until he came to bridge 551, where the accident happened, and found a washout on each side—the dump entirely gone; went back and placed the danger flag there, and went back to the depot; met the engineers and told them about the bridge; this day all traffic was stopped; he then proceeded south and placed there a flag; took three red flags; that he proceeded over the section about two hours and a half, and the operator walked back to the bridge with him; that is the operator at Trinchera, and he informed him of the condition of the bridge, and that he was going south; the operator saw the bridge and its condition was dangerous; that the operator stood on the bridge; about sixteen feet on each side of the dump was gone; it was entirely washed away, and just the rails and ties were hanging; the dump was washed out entirely to the foundation; the operator said all traffic was suspended; that regular trains had not been running for two or three days—not running in either direction; that he had no torpedoes, only the red flags.

The witness also gave evidence tending to show that he saw the train coming down by Adair, and that it slowed up, the same as the other witnesses; that he went down to Trinchera and saw the wreck; saw both Holloway and Bissell there that day.

On cross-examination the witness gave evidence tending to show that he placed the three flags, first one one mile from the house at Adair going south, and left one 555 — south of the depot; up by the upper Wye he placed another one there; this was in respect to two bridges, one a mile from Adair, and the other four miles; that in respect to the bridge where the accident happened, he used one of the flags, at the north end of the *north end of the* bridge, a red flag of the ordinary size; that Callaghan signalled the train in the usual way, and the train slowed down to almost a stop 300 or 400 yards away, and then pulled on.

Witness also gave evidence tending to show that this flag was put in the most conspicuous place, because along that place it is on a curve, and there is a cut, and the reason he did not put it back further in the cut was because it was most prominent there, and he put it where it would be the most likely to be seen and attract attention.

21 Q. Was it far enough?

A. It was not the exact distance back, I will own, because it would have been in the cut and he could not have seen it.

Q. It was far enough back, so if he observed it he could have stopped the train from going into the bridge?

A. I think so.

The witness then gave evidence tending to show that he had worked fifteen or sixteen years; worked on the track in this same kind of business. That it was the work-train that went through the bridge; that the cars composing the train were box cars and flat

cars, some of them loaded with ties, and some empty. Bridgemen and materials for fixing bridges were on it.

The plaintiff then called as a witness Dr. LYMAN, who, being first duly sworn, gave evidence in respect to the injuries received; but as no point is made on that testimony, it is omitted.

The plaintiff then introduced as a witness GEORGE S. LONG, who, being first duly sworn, stated that he was a locomotive engineer, in the employ of defendant, and was in its employ on the 17th and 18th of August; that the wreck occurred shortly after seven o'clock, on Monday morning, the 18th; that he was in charge of the engine that went through the bridge; that he started from Trinidad, but was given no orders, no special orders; started about four o'clock in the evening of the 17th inst. On cross examination: That he left Trinidad and went to Chicosa to pick up timbers for the purpose of repairing bridges and washouts; came back to Trinidad, and started for Trinchera, 39 miles away. The witness then stated that generally, when they go out on trains of this kind, they get a message telling where the places are, if they want any special work done, and to go to these places and do the work, and that is what he meant by not having orders; but at the same time they ran under the rules and regulations of the road, whether they had orders or not; that the engineers are conversant with the rules and regulations, and that he was familiar with these rules and regulations at the time of the accident.

The plaintiff then introduced as a witness EDMUND F. DUGGAN, who gave evidence tending to show that at the time of the accident he was a section laborer on the road at Adair; that he remembered the floods very well; that he went south of Adair on Sunday evening, about 4.30 in the afternoon, and was at Trinchera the same evening; went on a hand car, and crossed the bridge; that at that time the ties and rails were seen, and the approaches of the
22 bridge on either side were washed away for about twenty ties; that the ties and rails were suspended in mid-air, and dirt washed out from underneath; that he saw Superintendent Bissell and Roadmaster Holloway at Trinchera; saw them on the bridge, examining it, about six o'clock in the evening; that no repairs at that time had taken place; that the defects as to the bridge were plainly visible to anybody and everybody, and easily seen; that he returned to Adair on the hand car on the same day.

The witness then described the signals to stop the train going south on Monday morning, the same as the other witnesses, except that he says that some one came out of the caboose and gave a go-ahead signal and the train went ahead. The witness also stated that while at Trinchera, he looked in the window and saw a dispatch to Bissell, superintendent, stating that De Remer, with six car-loads of timber and a force of men, were on their way to Trinchera; this was Sunday evening about 7.30. The telegra*ph* was directed to Bissell.

On cross-examination, the witness gave evidence tending to show that it was from three to four miles from Adair to Trinchera; that he left Adair about 4.30 Sunday afternoon; that there was some bad track about one mile from Adair, and also at the bridge, where the washout had occurred; that it was passably safe until you got to the bridge; that you could see the bridge for about 900 feet before you came to it, and that the condition was plainly observable to anybody; that he saw it on the hand car before he got to it, and the hand car is between two feet and a half and three feet above the track; that the place where the engineer stands on the engine is from four to five feet above the track; that in going down, he observed the flag north of the bridge, about 600 or 700 feet north; that it was a red flag used on railroads as a danger signal, indicating that there was some dangerous point ahead on the track; that he saw this flag and the bridge simultaneously; that the train that came down was a work-train to repair the roads and bridges, and had a lot of material, and cars loaded with material, on it; some of the men were seated on timbers on the flat car; that the road had been in this bad condition ever since the 16th, and that the heavy rains on Saturday were what caused the washout at the bridge; that they got notice the bridge was washed out Sunday noon; that from Saturday, the 15th instant, until this work-train went down, there had been no regular trains over the road on account of washouts.

EDWIN L. FISHER, called as a witness for the plaintiff, and being duly sworn, gave evidence tending to show that he was a bridge carpenter, working for the defendant, and was working for
23 them in August, 1890; that he got to Trinchera on Sunday afternoon, before the accident, and saw the bridge about twenty minutes before the accident; that he went out to measure it for material to repair it; Holloway and Bissell were there, and directed him to examine it a short time before he went out; that this work-train went on to the bridge while going at a rate of ten or twelve miles an hour as near as witness could judge; that he at that time was just about a quarter of a mile from the bridge.

The witness, on cross-examination, stated that it had been raining before this for several days, and there were a good many washouts south of the bridge, and that the road was much demoralized; that trains were not running regularly, and had not been, as witness thinks, since the Thursday before the accident happened; that no other trains, except this train, with timbers on it, that witness recollected of, had been running; that the trouble was with the bridge; that the approaches had all been washed out at the time at the end of the bridge; that the north end of the bridge, the approaches, was washed out for about fifteen feet, but the rails and ties were not gone; the dirt was all washed out, and the ties and rails were suspended in the air, which was plainly to be seen; that the train consisted of five or six flat cars, three or four box cars and a caboose; that the flat cars were loaded with timbers and men riding on the timbers, some riding back inside of the box cars; the flat cars went into the creek, and the box cars and caboose remained on the track;

that there was nothing to prevent the engineer seeing the bridge as he came down on the north side.

The plaintiff was then sworn on his own behalf as a witness and gave evidence tending to show that he was section foreman for the Union Pacific at the time of the accident, and had been working for the company about 26 days; he remembered the accident and the rains and floods of the preceding days; that he was located on a branch of the road, known as the Maxwell branch, from Trinidad to Sopris; that on the 17th of August, on Sunday, he received orders to go down and take all the gangs on the branch of the road known as the Maxwell branch, and proceed to Trinidad; it was a written order, signed by Bissel, superintendent; that he returned and took his men down to Trinidad, walking about five miles; at Trinidad he loaded up car timbers, and reported to the civil engineer in the employ of the company; finally started out on the train for the south, with twenty-five or thirty men on the train; that all the foremen on the different sections and the gang of men were taken along; the train was under the charge of De Remer, when they got
24 to Trinidad; De Remer was contractor on the road, the Union Pacific; left Trinidad, about five o'clock Sunday evening; were working along the road all night, arriving at Adair about seven o'clock Monday morning; saw the stop signal given, and the signal answered by two short blasts of the whistle, and the train slowed up. Witness was on the second car behind the engine, and the men were riding all over the train, riding on the top of the box cars and some in the box cars; there were eight cars, five flat cars and three box cars and the caboose; that on starting from Trinidad, they first fixed up the bridge that was washed out, and then proceeded to another; after fixing it up, we all piled upon the train, and proceeded down the track; as a rule, the train went slow during the night; that after leaving Adair, they made no stops until they struck the bridge that had been washed out; that witness was on the second car and standing up at the time the accident happened, standing on the timber with which the car was loaded; two of his men were with him and about twenty men were riding on the flat cars with the timbers. Witness then gave evidence tending to show that the car was thrown into the creek, and that he was injured, &c., and as to the nature of his injuries, all of which is omitted as no point is made on it.

On cross-examination the witness stated that he had been railroading for the greater part of his life, for twenty-six years, on construction, and was also foreman, laborer and track-layer on various roads; that at Trinidad these cars were loaded with pile-head and piling timbers of different kinds, for repairing washouts and bridges; witness knew that the train was sent out to repair the roads and bridges; that one De Remer had charge of the whole outfit—was bossing it; that the timbers upon which he was riding were bridge timbers, square, eight by sixteen, something of that shape; they were laid about three tier, about three feet or more high, three and a half or four feet, to the top of the cars they were loaded; that he

had been standing up a mile or so before the accident happened; thinks the train ran at the rate of twenty miles an hour about from Adair down to the bridge; that he could have ridden in the box cars, but the box cars were not fit for the men to ride in; he examined them to see. The witness admitted that he knew it was dangerous to ride on a flat car with a lot of timbers, and more dangerous to ride on a car that was loaded with timbers than a box car.

Witness also gave evidence tending to show that the man next to him sitting down was killed, and a man in a box car was hurt, Dan McCarty, on his head.

25 Witness also gave evidence tending to show, that about five miles before they got to Adair, some 200 ties fell off on account of some sticks breaking on the cars.

The plaintiff then introduced Mrs. CALLAGHAN, wife of the plaintiff, who, being first duly sworn, gave evidence in respect to the injuries received, &c.

The foregoing was all of the evidence offered by the plaintiff upon the points mentioned.

The defendant, to sustain the issues on its part, called as a witness J. R. DE REMER, who gave evidence tending to show that he was the contractor working for the defendant, and in charge of this work-train to which the accident happened; that box cars were put on at Trinidad at his instance for the accommodation of the men on the washouts; three cars were loaded with freight, and one car with a little flour and a piece of beef in it; that there were four box cars in all; with the exception of the little freight mentioned, there was nothing in the car but tools to work with on the washouts, track tools, bridge tools, and there was an abundance of space for at least one hundred men.

The object in putting them on was because of the comfort of the men, and because of less danger in riding in box cars than in flat cars in case of washouts; that there is always more or less danger in riding on a car loaded with timber or ties; they are always liable to roll out by a jar; that every one of the foremen of these gangs were notified that these box cars were provided for the accommodation of the men; that none of the box cars went off the track, and a good many people were riding in the box cars; the train was a construction train or work-train; that before this time, they had been having washouts for several days, which was well known to the parties running the work-train—known to the engineer and to all the men who were acquainted with the business that they were out on. That they started from Trinidad in the afternoon going south, repaired bridges and made a great many stops; witness himself walking over the line for about twenty-two miles to examine the bridges—walked ahead of the train with a lantern and the track foreman.

On cross-examination the witness stated, that he was contractor for the company; that he got a telegram from Superintend-

26 ent Bissell, asking him to assist in closing the gap on the

road; got the telegram Sunday morning; that he had charge of the men on the train repairing the washout; thirty-five or thirty-eight men in his gang, and fifteen or eighteen more in the other gangs—anywhere from fifty-five to sixty-five men on the train; that he had nothing to do with the running of the train, that is, to control the engineer, fireman or conductor; a great many of the men rode on the flat cars with the timbers, though they were warned against it; that he warned them when he started; that the conductor of the train was in the cars sometimes, and sometimes out on the train; that he saw men riding on the flat cars, but said nothing to them about it.

The defendant also introduced as a witness, HOLLOWAY, who, being first duly sworn, gave evidence tending to show that he was roadmaster at the time of the accident, working for the defendant; that the condition of the road from the 14th of August up to the time of the accident, was bad for a distance of thirty-five or forty miles; that he got to Trinchera Sunday afternoon; that he was on the ground about ten minutes after the accident happened; that it is dangerous to ride on cars loaded with timber, and safer to ride in box cars at the rear end of the train; that the accident happened by running into the washout, where it had washed out on the end of the bridge; the engine had crossed the washout about forty feet on the other side of the bridge, and the flat cars had gone through the bridge, and the timbers were piled up in every way.

On cross-examination the witness stated that Martin Callaghan, one of the witnesses, went over to Adair for the tools, as stated by him; that he did not know whether any steps were taken by Bissell to notify others coming, but he knew that the road was quarantined since the 19th.

Witness LONG, recalled by the defendant, gave evidence tending to show, that he was the engineer working on this work-train, and that he was on the same engine for two days prior to the time of the accident; that he was probably at Trinidad, and that he knew of the floods when they started out, and that he was to go and repair the road.

The defendant then introduced as a witness, W. F. DUBELL, who, being first duly sworn, gave evidence tending to show that he was a bridge-builder, and that he was with this work-train; he also stated in respect to the number of men on the cars, the same as the other witnesses; a part of them rode on the bo- cars and a part of them on the flat cars, and that the box cars were the safer
27 place; that he thought most of the men at Trinidad when they put their flags and tools in the box car, understood the instruction to get in there—at least his men understood it; that the witness specially told his men to get into the box car; that he heard De Remer tell Mr. Henry to put his men and tools into the box car; Henry is a trackman under De Remer.

The defendant also introduced as a witness, GEORGE A. ARMSTRONG, who, being first duly sworn, gave evidence tending to show, that several days before the accident, no trains were passing over the road; that it was safer to ride in a box car than in a flat car, and that he had been railroading for thirty years.

Thereupon, counsel for defendant stated, that with the exception of reading the rules of the company, that the above was all the evidence to be offered.

And he thereupon asked the court to instruct the jury that there was no evidence sufficient to warrant the jury in finding a verdict for the plaintiff on three grounds:

1st. Not any sufficient evidence of negligence of the defendant causing the injury;

2. Contributory negligence on the part of the plaintiff; and,

3rd. Negligence of fellow-servants.

Thereupon the court said:

"The motion to instruct for defendant is denied. In the general view of the testimony presented by the defendant's counsel, I think he is right in saying that the evidence fails to show negligence on the part of the defendant. It is probably true that the superintendent of the defendant was not required to give notice to the conductor of defendant's train of the condition of the bridge at Trinchera. A train going out on the road to make repairs, I think the superintendent might readily assume that all persons on the train would proceed carefully, and examine every place they came to where there might be danger of a washout, particularly the water-courses. But this did not relieve the conductor of train from the use of care in going forward with that train. It is said there is no evidence that there was a conductor on board, and that is true. There is no direct testimony to that effect, but we may assume that there was a conductor from the general course of the business, and also from the fact that when the train reached Adair, some one gave a signal for going on, which was immediately obeyed by the engineer; and whether the conductor used proper care in going forward after the train had been halted at that place, without making inquiry as to the cause of the train being arrested, and whether he used proper care in going upon the bridge without examining it to see whether it was safe for the use of a train of that character, is, it seems to me, a question for the jury."

28

To which ruling of the court in refusing to instruct the jury for the defendant, defendant, by its counsel, then and there duly excepted.

The court then continued:

"I wish to say, also, a matter which I overlooked in what I said a moment ago, as to whether plaintiff was riding in a proper place; whether it was negligence for him to get on the timbers instead of riding in a box car, that is also a question for the jury. It is a question of fact for the jury to determine whether he was negligent in going into that place."

The defendant then introduced in evidence rule 227:

"In case of an extraordinary rain storm or high water, trains

must be brought to a stop, and a man sent out to examine bridges, trestles, culverts and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping places, and, when thought advisable, make extra stops to ascertain the extent and severity of storms, taking no risk.

In case of doubt as to the safety of proceeding, they will place their trains upon a siding, and remain there until certain it is safe to proceed."

Which was all of the evidence offered by the defendant.

Thereupon the plaintiff offered to introduce evidence showing that there was a conductor on the train.

Thereupon the defendant asked the court to instruct the jury as follows:

1.

"The court is asked to instruct the jury that, under the evidence in this case, the accident appears to have been caused by the failure of the engineer of the work-train to observe the rules and regulations of the company in respect to running trains in cases of extraordinary floods, &c., and in his failure to observe the danger signal that, according to the evidence, had been placed in places where he ought to have seen the same in the exercise of the care that was required of him in respect thereto.

Asked by defendant."

29 2.

"The court is asked to instruct the jury that they are not at liberty to infer from the evidence in the case that the accident was caused by the negligence of the conductor in signalling the engineer to proceed after the train had slowed down, since such signal to the engineer in nowise released the engineer from care in respect to observance of all precautions necessary to prevent an accident under the circumstances, the evidence showing that the engineer must have been aware of the likelihood of danger at any place along the line.

Asked by defendant."

3.

"The court is asked to instruct the jury that the mere fact that the accident would not probably have happened if the conductor had allowed the train to be brought to a stop at Adair, affords no ground for saying that not stopping the train at Adair was the cause of the accident, since it is true that if the train had not started from Trinidad or Adair or run at all, the accident would not have happened, and the mere fact of starting the train, or continuing the train in motion after it had started, does not make the running of the train under those circumstances the proximate cause of the accident by which the plaintiff was injured.

Asked by defendant."

4.

"The court is asked to instruct the jury, that the jury are not at liberty to infer, or even from the mere fact that the conductor gave signal to proceed after the engineer had slowed up at Adair, was the proximate cause of the injury to the plaintiff, since such signal to proceed can be held to proceed in precisely the same manner as the engineer was bound to proceed under the rules and regulations of the company under which he was acting, and in view of what the engineer knew of the dangers he was bound to apprehend from the floods, &c., that had existed for some days prior to the accident; and that even if the jury believe from the evidence it was negligent in the conductor to proceed after he had slowed down, yet the plaintiff will not be entitled to recover because of such negligence of the conductor, unless they further believe from the evidence that such negligence was the proximate cause of the injury."

But the court refused to give each and every of said instructions; to which ruling of the court the defendant, by its counsel, then and there duly excepted.

Whereupon, the court instructed the jury as follows:

"In this action, plaintiff seeks to recover damages for injuries received by him while in the service of the defendant. Such an action is founded on acts of negligence allowed against the defendant.

In general, a person in the service of another cannot recover for an injury which he may receive while in such service. Unless the person employing him has failed in something which is enjoined upon him by law for his protection, and such failure has been a cause of injury. The case is not peculiar on the ground of the defendant being a railroad company; the rule is the same relating to all classes of employers, and to all classes of people who are in the service of employers. We have cases arising from accidents occurring in mines, in smelters; sometimes in factories. There are numerous cases reported in the books occurring on shipboard, and so on.

I say this because sometimes there is an impression in the minds of juries that the case of a railroad company differs from that of another employer. Such is not the fact; the rule is very different as to persons who are in the service of another, whether it be a railroad company or any other employer, from that which is recognized in the case of a passenger on a railroad, or on shipboard, or on any other means of conveyance. The rule in respect to persons who are in service is that the employer is bound only to ordinary care in respect to the conduct and safety of persons in his service—while in respect to passengers, those who have no such relations with the carrier, the highest degree of care is exacted.

I can point out to you from the circumstances presented in the evidence something of a difference which obtains in the two classes of cases.

Now, the question is whether in respect to the injury which the plaintiff received on this occasion the railroad company was guilty

of negligence towards him which caused the injury, and whether at the time he received the injuries he was in any way contributory thereto, which, in this case, means whether he was in a position which he ought not to have taken at that time.

It was alleged by the plaintiff in his comp-aint, and also put in evidence before you, that the condition of the track at this bridge, each end of the bridge, became known to the superintendent and to the roadmaster, and, perhaps, to some other people connected with the defendant company, the day before the accident occurred, and that it was their duty to notify the people who were going upon this train, the conductor in charge of it, or whoever
31 had charge of it at Trinidad, of the condition of the road at that place. I do not think that as to this case, and as to the plaintiff in this suit, he being a person in the service of the company, and engaged in the business of mending the road, that there was any such duty resting upon the defendant company; that is a duty which would have been upon the company in respect to passengers going over the road, because in that matter the company is held to the greatest diligence; and in that matter, and as it affects a passenger going over the road, the mere occurrence of the accident, the circumstance that an injury is received by a passenger, is held to be of itself evidence of negligence on the part of the company.

In other words, the duty resting upon the company to carry people over its road safely and carefully, is of such a character, so extraordinary on account of the means employed, and the great danger of the service, that the mere occurrence of an accident is in itself regarded as evidence of negligence on the part of the company. But in respect to persons who are in the service of the company the rule is otherwise. There, as I said before, the company is bound only to the exercise of ordinary care, by which is meant that care which ordinary prudence enjoins upon those beset by dangers of the same character and kind; and so, although it would have been the duty of the officers of this company, the superintendent and roadmaster, and whoever was in authority at Trinchera, to notify the parties who were going to bring down this train from Trinidad of the condition of the track at this particular bridge, if this had been a passenger train, I do not think there was a duty resting upon them in respect to the people who were going out upon the road to make repairs. It might be well assumed they would look out for any washouts which might occur on the road.

You remember Mr. De Remer testified that the night preceding the accident he walked for a long distance ahead, finding many places where there were breaks in the road, and which it was necessary to mend; that he walked in order to discover defects in the road; perhaps that course was necessary in the night-time. So they were fully advised, it appears; these men going forward to mend the road were aware of the condition of things, and it was their duty to look out for breaks, and especially any water-courses such as that at the place called Trinchera. So that we may exonerate the company in respect to that matter. The company caused a flag to be set up at the bridge, and the people on both sides of the

bridge knew about it; so that there were reasonable means employed
for the information of such people as these were, who were
32 proceeding upon the train to make repairs. And then the
question comes—these people going down from Trinidad in this way, proceeding towards the south, whether the person in charge of the train, the conductor, if there was one, ought to have taken greater precautions for discovering the break in the road. Upon that, it has been held by the Supreme Court, and by other courts, that a conductor in charge of a train is a person representing the company, with such authority in the premises, that any omission on his part, if there is an omission, may be regarded as the act of the company.

Now, it seems that when the train got within a short distance of the place where the accident occurred, within four or five miles, perhaps——

Mr. TELLER: Seven, your honor.

Mr. BRYANT: Three, I think.

The COURT: I don't remember the distance, gentlemen, but it is not very material whether it was three miles or seven—whatever the distance was, the people at the station being advised of the condition of things down at the bridge, sought to stop the train; and the brother of the plaintiff went out and gave a signal for the train to stop. Thereupon the train slowed up, whether it came exactly to a stand, or nearly so, and then proceeded, is not well stated by the witnesses. But, at all events, without holding any communication with any one who was there at the station, and who could have given information of the dangers ahead, the train proceeded. Was this a negligent act on the part of the conductor on this train? Counsel stated before me in argument in your absence that there was no testimony to show there was a conductor. That is the fact; no witness testified that there was a conductor there, but according to the ordinary course of business in the management of railroads, we know that conductors are usually sent out with trains. I do not recall any instance in which it has been said that a train went without a conductor; and probably that has been your observation also, gentlemen; so I think it may be reasonably inferred that there was a conductor on the train.

You remember, also, that one of the witnesses stated that when the train was nearly at a stand, or perhaps had come to a stand, that some one signalled the engineer to go on; whereupon he proceeded. It is a reasonable inference that this was the conductor, that some one in authority, in charge of the train, signalled the engineer in this manner.

Now, the question is whether in the reasonable management or
the business, having regard to the circumstances which pre-
33 vailed at that time, that it was known that the road was
broken up by storms, and that there were many places to be repaired, and that this band of men who were out upon the train with timbers and other materials for making repairs, were in the business of making repairs at that time, having regard to all the circumstances, ought the conductor to have stopped to inquire upon

what occasion the signal had been given—why it was that he had signalled to stop? If you say he ought, that such was a reasonable thing for him to do under the circumstances, that may be an act of negligence on the part of the company; but if you say that no such duty rested upon him, that he might easily suppose that the men had some idle or whimsical reason for requiring him to hold up there, then it was right enough for him to go on. That is committed to you, gentlemen, to decide whether it was reasonable and proper for him to go on as he did under the circumstances; and if you say that he acted reasonably in that, then ought he to have stopped before he came to the bridge, or came upon it, for the purpose of investigating? It seems at this time the road was considerably broken up, as stated by all the witnesses. Was it a prudent thing for one to go upon the bridge without stopping to look and see whether it was safe for the passage of a train? The conductor, if there was one, doubtless knew very well where the bridge was; so did the other men on the train. If you say he ought to have stopped to look and investigate, that may be an act of negligence; of to go ahead, to go over the bridge without making any investigation was reasonable and prudent, then no negligence is to be imputed to him.

Furthermore, in respect to these acts, it must appear to you that if the conductor had taken such precautions, had stopped at Adair to inquire of the people who halted him there, or stopped to inquire before entering on the bridge, in the manner explained to you, he would have ascertained the danger, and thus the injury to plaintiff would have been averted; that must be made to appear. This is within your cognizance also.

It has been said by counsel if there was negligence on the part of the engineer, and if it was negligence in him alone, the plaintiff here could not recover, because we have a rule of law to the effect that where injury occurs through the negligence of one who is regarded as a fellow-servant of the plaintiff; that is, if he is one in the same service, engaged in performance of the same duty at the time, that the plaintiff shall not recover for that reason; because the employer cannot be responsible for things resulting from the negligence of people engaged in the same business at the
34 same time. The law intends they shall watch over each other to some extent, and that they shall give notice of any defects of character or conduct which may be necessary to protect each other from injury arising from the hazards of the occupation.

Now, I suppose that the red flag was up when the engineer came there, and that he did not see it; he did not look; and so also he knew of the bridge, and he knew that this was a time of danger, and that it would be dangerous for him to go upon it; but if there was negligence on his part, and negligence also on the part of the conductor, both contributing to this result, the company is not exonerated by that circumstance; if it was the negligence of the engineer alone, if the accident came to the plaintiff because of his misconduct alone, then the company will not be liable to plaintiff; because the engineer was in the situation of a fellow-servant; but

the conductor is not in that situation; he is in the position of a chief, in the position of the principal, having the management of affairs, so far as the running of the train is concerned, and his authority over others upon the train is such that his negligence is regarded as that of his principal, or the company.

So now, if the negligence of the conductor contributed also to the injury, if the injury was in part due to him, the plaintiff may have his action; but if it was due entirely to the engineer, the locomotive man upon the engine, then the plaintiff cannot recover.

This is enough as to the position of the plaintiff and defendant, except that I must explain to you what was said by counsel and was referred to by the witnesses about the plaintiff going upon the flat car; and the question is whether he was guilty of negligence in doing that. You know that the box cars did not go down into the stream; they remained on the track, and no one who was in the box cars was injured, so that if plaintiff had gone in the box cars, he would not have — injured—and the contention of counsel for defendant is that it was negligence on his part; that is, that he was in default in going upon the flat car, and amongst the timbers to ride. That is a question for your consideration.

Also, counsel contended before you that the box cars were put in the train for the men to ride in; and so they were to this extent, at least, that they were there for protection from the storms and winds. I doubt somewhat whether they were put there as being cars of greater safety than the flat cars to ride upon. Perhaps they were. You can judge of that as well as any of us, and you are to judge of that also. If you say that the cars were more safe, and less dangerous to ride in, as perhaps they were, and that it was an act of negligence on the part of plaintiff to go on the flat car under the circumstances, then he cannot recover, because if he had been in the box car, he would not have been injured.

If the injury had occurred from a falling stick, that is, from a stick rolling off the car carrying him with it, while the car was in its ordinary progress, the case would be pretty clear against them, but whether men going out upon such an errand, and not anticipating any such accident — occurred, whether a man of ordinary prudence and care for himself would regard the place as particularly a place of danger, seems to me a little doubtful.

It is not contended, and if it were, the evidence does not show that there was any express direction to the men to go into the box car, that is to say, even as a measure of safety. Probably they all understood that the cars were there for their comfort and convenience, and they could go into them if they wished to. Ought this man to have done so, for the purpose of avoiding a danger with which he was menaced upon this occasion? Now, upon that, gentlemen, the question is whether the plaintiff was in fault in going there; whether he thus contributed to the injury which he received. If he did, in your judgment, he cannot recover.

In other words, in this action, as in all cases of the kind, the plaintiff must have been without fault, and the defendant must have been in fault, and the fault must have resulted in injury to the

plaintiff. You charge the defendant upon that ground, and upon that only.

Now, if you find for the plaintiff upon all points, the question then comes as to the damages to which he is entitled, and upon that, he is entitled to such sum as you may feel inclined to give him for the pain and suffering which he endured in the breaking of his limb. That is not a thing which can be come at very easily in dollars and cents. And it is not what the plaintiff's counsel suggested to you that you should see what you would submit to a thing of that kind for. You cannot go upon any such ground as that, because I presume none of you would have such an injury for all the money in the treasury of the Union Pacific railway. Certainly I would not. So that we cannot go upon that ground.

And it is a question as to what you, as reasonable men, will say ought to be given in the way of money consideration; you do not heal the wound; you do not destroy the pain or remove the injury which he suffered; his sufferings will not be alleviated by any consideration of what he might recover for it. But the question
36 is what you will give him for such suffering, reasonably, justly, fairly, with reference to the rights of both parties. And then he is entitled to what he expended in the way of his cure; a good part of that was through the hospital of the defendant company; he did not lay out any money for it at all. He says he paid out something like one hundred dollars or less in that way. And then he is entitled to his loss of time, according to the wages which he earned, which I believe was something like sixty dollars a month, and to his disability hereafter; you may judge of the extent of that disability; and upon that—is—loss of earnings; what he has lost, and what he may lose hereafter, you can make a pretty correct estimate. He told you what his age was. Counsel often put in the life tables of insurance companies which assume to show how long a man of certain age may expect to live, but they did not do that in this instance, and so you can judge as best you may, according to his age and capacity, what his earnings would be.

In all these cases, we do not go upon any ground that there shall be punishment for any wrong-doing. It is assumed that the company itself would have been glad to prevent the injury if it could have done so, and that whatever damages you may allow, shall be somewhat in the way of putting the plaintiff in the position in which he would be if he were in the same state of health which he had when he received the injury. We do not sustain verdicts for very large amounts in these cases. I believe the plaintiff has not sued for a very large amount.

COUNSEL: For fifteen thousand dollars.

The COURT: We do not sustain very large verdicts in cases of this kind, especially where a man's ability to earn money is no greater than it is shown to be in this case. The damages are in your discretion; the court does not direct or interfere with them, except in some cases where it is thought to be excessive. It is in the judgment and discretion of the jury.

Thereupon, the jury retired, and afterwards brought in a verdict for the plaintiff and against the defendant for the sum of $4,500.00.

Thereafter, and on the 28th day of May, 1892, the defendant filed a motion for new trial, which said motion is in the words and figures following, to wit:

"Now comes the defendant in the above-entitled action, and moves the court to set aside the verdict heretofore rendered herein, and to grant a new trial in this cause for the following reasons, to wit:

First: Because the complaint herein does not state facts sufficient to constitute a cause of action.

37 Second. Because the court erred in admitting incompetent, illegal, irrelevant and improper testimony offered by the plaintiff against the objection of defendant.

Third. Because the court erred in refusing to admit proper, competent, material and relevant testimony offered by defendant.

Fourth. Because the court erred in instructing the jury as requested by the plaintiff.

Fifth. Because the court erred in refusing to instruct the jury as requested by the defendant.

Sixth. Because the court erred in instructing the jury on its own motion.

Seventh. Because the court erred in overruling the motion made by the defendant for an instruction to the jury that it find for the defendant.

Eighth. Because the verdict is contrary to law and against the evidence.

Ninth. Because there is no evidence upon which the verdict can be allowed to stand.

Tenth. Because, according to the instructions of the court, the jury could not have found for the plaintiff, unless it found that the accident was caused by the negligence of the conductor, and there is no evidence to show that the negligence of the conductor was the proximate cause of the accident.

Eleventh. Because the verdict is excessive."

That afterwards, and on, to wit, the 2nd day of November, 1892, the said motion for new trial coming on to be heard, the same was by counsel argued before the court, and was taken under advisement by the court.

That afterwards, and on, to wit, the 9th day of November, 1892, the court overruled said motion for new trial, and entered judgment on the verdict of the jury for the said sum of $4,500.00.

And thereupon, the defendant was given forty days in which to prepare and tender its bill of exceptions on writ of error, to the United States circuit court of appeals for the eighth circuit.

And, forasmuch, as the foregoing matters and things do not fully appear of record therein, the defendant makes and tenders this, its

bill of exceptions, and asks that the same may be signed and sealed by the court, which is done accordingly.

By the court:

MOSES HALLETT, *Judge.* [SEAL.]

O K.

THOMAS, BRYANT & LEE.

38 Indorsed: No. 2680. Circuit court. James Callaghan *vs.* The Union Pacific Railway Company. Bill of exceptions filed Dec. 17, 1892. Robert Bailey, clerk. Teller, Orahood & Morgan, attorneys for def't.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

Know all men by these presents that we, The Union Pacific Railway Company, as principal, and Willard Teller and David H. Moffat, as sureties, are held and firmly bound unto James Callaghan in the full and just sum of six thousand ($6,000) dollars, to be paid to the said James Callaghan, his heirs, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 9th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

Whereas, lately, at the November term, A. D. 1892, of the circuit court of the United States, for the district of Colorado, in a suit pending in said court between James Callaghan, plaintiff, and The Union Pacific Railway Company, defendant, judgment was rendered against the said The Union Pacific Railway Company, and the said The Union Pacific Railway Company — obtained a writ of error to the United States circuit court of appeals for the eighth circuit, to reverse the judgment of the said court, and a citation directed to the said James Callaghan and his attorneys, citing and admonishing them to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said The Union Pacific Railway Company shall prosecute said writ of error to effect, and answer all damages and costs, if it fails to make good its plea, then the above obligation to be void, else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY CO., [SEAL.]
By WILLARD TELLER, *Its Att'y-in-fact.* [SEAL.]
WILLARD TELLER. [SEAL.]
D. H. MOFFAT. [SEAL.]

Sealed and delivered in presence of—

——— ———.

Approved Dec. 17, 1892.

MOSES HALLETT, *Judge.*

39 *Justification.*

UNITED STATES OF AMERICA, } ss:
District of Colorado, County of Arapahoe, }

Willard Teller and David H. Moffat, sureties on the within bond, being each first duly sworn, deposes and saith that he is worth in property, not exempt from execution and attachment, the sum of six thousand (6,000) dollars.

WILLARD TELLER.
D. H. MOFFAT.

Subscribed and sworn to before me this 9th day of December, A. D. 1892.

[SEAL.] C. M. SPERRY,
Notary Public.

My commission expires January 25th, 1893.

Indorsed. Gen. No. 2680. Circuit court of the United States, district of Colorado. Union Pacific Railway Company, pl. in error, *vs.* James Callaghan, def't in error. Bond on writ of error. $6,000. Filed this 17th day of Dec., A. D. 1892. Robert Bailey, clerk.

Writ of Error.

THE UNITED STATES OF AMERICA.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

The President of the United States of America to the honorable the judges of the circuit court of the United States for the district of Colorado, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the November term, 1892, thereof, between The Union Pacific Railway Company, plaintiff in error, and James Callaghan, defendant in error, a manifest error hath happened, to the great damage of the said The Union Pacific Railway Company, plaintiff in error, as by its complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals,
40 for the eighth circuit, together with this writ, so that you have the said record and proceedings aforesaid at the city of St. Louis, Missouri, and filed in the office of the clerk of the United States circuit court of appeals, for the eighth circuit, on or before the 13th day of February, 1893, to the end that the record and proceedings aforesaid being inspected, the United States circuit

court of appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of December, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States the 117th year. Issued at office in Denver, in said district, with the seal of the circuit court of the United States, for the district of Colorado, and dated as aforesaid.

ROBERT BAILEY,
Clerk Circuit Court United States, District of Colorado.

Allowed by—

MOSES HALLETT, *Judge.*

Return.

THE UNITED STATES OF AMERICA, *District of Colorado,* } *ss:*

In obedience to the command of the within writ, I herewith transmit to the honorable, the United States circuit court of appeals, a duly certified transcript of the record and proceedings in the within-entitled case, together with all things concerning the same.

Seal of United States Circuit Court, District of Colorado.

In witness whereof, I hereto subscribe my name and affix the seal of said circuit court of the United States for the district of Colorado, at Denver, in said district, this 17th day of Jan'y, 1893.

ROBERT BAILEY, *Clerk.*

DISTRICT OF COLORADO, *ss:*

The plaintiff in error, having served this writ, by lodging a copy thereof in the clerk's office where the record remains, and having given the security required by law, on the issuing of the citation, within the time required by law, this writ therefore becomes a supersedeas.

In witness whereof, I hereto subscribe my name, and affix the seal of said circuit court of the United States, for the district of Colorado, at Denver, in said district, this — day of ——, A. D. 189–.

——, *Clerk.*

41 Gen. No. 2680. United States circuit court of appeals, eighth circuit. The Union Pacific R'y Co., plaintiff in error, *vs.* James Callaghan, defendant in error. Writ of error. To circuit court U. S., district of Colorado. Filed in United States circuit court, district of Colorado, this 17th day of December, A. D. 1892. Robert Bailey, clerk. Teller & Orahood, attorney- for plaintiff in error.

Citation.

THE UNITED STATES OF AMERICA, }
District of Colorado. }

United States Circuit Court of Appeals.

The United States of America to James Callaghan, defendant in error, Greeting:

You are hereby cited and admonished to be and appear in the United States circuit court of appeals for the eighth circuit, at the city of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Colorado, sitting at Denver, in said district, wherein The Union Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Moses Hallett, judge of the circuit court of the United States for the district of Colorado, this 17th day of December, in the year of our Lord one thousand eight hundred and ninety-two.

MOSES HALLETT,
Judge of Circuit Court.

Proof of Service.

THE UNITED STATES OF AMERICA, }
District of Colorado, } *ss:*

On this — day of ——, A. D. 189–, personally appeared —— —— before me, the subscriber, clerk of the —— court of the United States for the district of Colorado, and makes oath that he delivered a true copy of the within citation to —— ——.

—— ——,
—— ——.

Sworn to and subscribed before me, this — day of ——, A. D. 189–.

—— ——, *Clerk,*
By —— ——, *Deputy Clerk.*

42 STATE OF COLORADO, }
County of Arapahoe. }

Received copy of within writ on behalf of d'f't in error, this 20th day of Dec., 1892.

THOMAS, BRYANT & LEE,
Att'ys for D'f't in Error.

Mr. B. Gen. No. 2680. United States circuit court of appeals, eighth circuit. U. P. R'y Co., plaintiff in error, *vs.* James Callaghan, defendant in error. Citation. Filed in United States circuit court for the district of Colorado, this 21st day of December, A. D. 1892. Robert Bailey, clerk. Teller, Orahood & Morgan, attorney-for plaintiff in error.

Assignment of Errors.

In the Circuit Court of the United States, District of Colorado.

JAMES CALLAGHAN, Plaintiff,
vs.
THE UNION PACIFIC RAILWAY COMPANY, Defendant. } No. 2680.

Now comes the Union Pacific Railway Company, and says, that in the record and proceedings herein, there is manifest error in this, to wit:

1st. The court erred in refusing to instruct the jury that there was no evidence sufficient to warrant the jury in finding a verdict for the plaintiff, on the three grounds mentioned, to wit:

(1) Not any sufficient evidence of negligence of the defendant causing the injury;

(2) Contributory negligence on the part of the plaintiff; and,

(3) If there was any negligence, it was the negligence of fellow-servants.

Second. The court erred in the opinion delivered in the presence of the jury, in stating to the jury that it was a question for them as to whether the conductor used proper care in going forward after the train had been halted at that place (Adair), without making inquiry as to the cause of the train being arrested, and whether he used proper care in going upon the br*d*ige without examining it to see whether it was safe for the use of a train of that character, and deciding that that was a question for the jury.

Third. The court erred in refusing to give instruction No. 1, asked by the defendant; which instruction was in the words and figures as follows, to wit:

43 "The court is asked to instruct the jury, that, under the evidence in this case, the accident appears to have been caused by the failure of the engineer of the work-train to observe the rules and regulations of the company in respect to running trains in cases of extraordinary floods, &c., and in his failure to observe the danger signal that, according to the evidence, had been placed in places where he ought to have seen the same in the exercise of the care that was required of him in respect thereto.

Asked by defendant."

Fourth. The court erred in refusing to instruct the jury at the request of the defendant, being instruction No. 2, as asked, as follows:

"The court is asked to instruct the jury, that they are not at liberty to infer from the evidence in the case that the accident was

caused by the negligence of the conductor in signalling the engineer to proceed after the train had slowed down, since such signal to the engineer in nowise released the engineer from care in respect to observance of all precautions necessary to prevent an accident under the circumstances, the evidence showing that the engineer must have been aware of the likelihood of danger at any place along the line.

Asked by defendant."

Fifth. The court erred in refusing to instruct the jury at the request of defendant as follows, it being instruction No. 3, as asked:

"The court is asked to instruct the jury, that the mere fact that the accident would not probably have happened if the conductor had allowed the train to be brought to a stop at Adair, affords no ground for saying that not stopping at Adair was the cause of the accident, since it is true that if the train had not started from Trinidad or Adair, or run at all, the accident would not have happened, and the mere fact of starting the train, or continuing the train in motion after it had started, does not make the running of the train under those circumstances the proximate cause of the accident by which the plaintiff was injured.

Asked by defendant."

Sixth. The court erred in refusing to instruct the jury at the request of the defendant, as follows, it being instruction No. 4, asked by the defendant:

"The court is asked to instruct the jury, that the jury are not at liberty to infer, or even from the mere fact that the conductor gave signal to proceed after the engineer had slowed up at Adair,
44 was the proximate cause of the injury to the plaintiff, since such signal to proceed can be held to proceed in precisely the same manner as the engineer was bound to proceed under the rules and regulations of the company under which he was acting; and in view of what the engineer knew of the dangers he was bound to apprehend from the floods, &c., that had existed for some days prior to the accident; and that even if the jury believed from the evidence that it was negligent in the conductor to proceed after he had slowed down, yet the plaintiff will not be entitled to recover because of such negligence of the conductor, unless they further believe from the evidence that such negligence was the proximate cause of the injury."

Seventh. The court erred in instructing the jury on its own motion in the words and figures following:

"And then the question comes: These people going down from Trinidad in this way, proceeding towards the south, whether the person in charge of the train, the conductor, if there was one, ought to have taken greater precautions for discovering the break in the road. Upon that it has been held by the supreme court, and by other courts, that a conductor in charge of a train is a person representing the owner, with such authority in the premises, that any omission on his part, if there is an omission, may be regarded as the act of the company. Now, it seems that when the train got within a short distance of the place where the accident happened—

within four or five miles, perhaps—I do not remember the distance, gentlemen, but it is not very material, whether it was three or seven miles; whatever the distance was, people at the station, being advised of the situation of things down at the bridge, sought to stop the train, and the brother of the plaintiff went out and gave a signal for the train to stop. Thereupon, the train slowed up. Whether it came entirely to a stand, or nearly so, and then proceeded, is not very well shown by the witnesses. But at all events, without holding any communication with any one who was there at the station, and who could have given any information of the danger of the road, the train proceeded. Was this a negligent act on the part of the conductor on this train?"

The court erred in leaving this question of negligence to the jury.

Eighth. The court erred in further instructing the jury in words following, to wit:

"You remember that one of the witnesses stated that when the train was nearly at a stand, or perhaps, had come to a stand, some one signaled the engineer to go on, whereupon, he proceeded. It is a reasonable inference that this was the conductor, or some one in authority in charge of the train who signaled the engineer in this manner. Now, the question is, whether, in the reasonable management of the business, having regard to the circumstances which prevailed at that time that it was known that the road was broken up by storms, that there were many places to be repaired, and that this band of men who were out upon the train with timbers and other materials for making repairs, and were in the business of making repairs at that time, having regard to all the circumstances, ought the conductor to have stopped to inquire upon what occasion the signal had been given—why it was that he had been signalled to stop? If you say that he ought—that such was a reasonable thing for him to do under the circumstances, that may be an act of negligence on the part of the company; but if you say that no such duty rested upon him, that he might easily have supposed that the men had some idle or whimsical reason for him to hold up there, then it was right for him to go on. That is committed to you, gentlemen, to decide whether it was reasonable and proper for him to go on as he did, under the circumstances; and if you say that he acted reasonably in that, then ought he to have stopped before he came to the bridge or came upon it, for the purpose of investigating? It seems at this time that the road was considerably broken up, as stated by all the witnesses. Was it a prudent thing for one to go upon a bridge without stopping to look and see whether it was safe for the passage of a train? The conductor, if there was one, doubtless knew very well where the bridge was; so did the other men on the train. If you say that he ought to have stopped and looked and investigated, that may be an act of negligence; if to go ahead, then to go over the bridge without making an investigation was reasonable and prudent, then no negligence is to be imputed to him."

Ninth. The court erred in instructing the jury, as follows:

"Furthermore, in respect to these acts, it must appear to you that if the defendant company had taken such precautions, had stopped at Adair to inquire of the people who halted him there, or stopped to inquire before entering upon the bridge in the manner complained to you, he would have ascertained the danger, and thus the injury complained of would have been averted. That must be made to appear. This is within your cognizance also."

Tenth. The court erred in instructing the jury in words as follows:

46 "Now, I suppose that the red flag was up when the engineer came there, and that he did not see it; he didn't look; and so also he knew of the bridge, and knew that this was a time of danger, and that it would be dangerous for him to go upon it; but if there was negligence on his part, and negligence also on the part of the conductor, both contributing to this result, the company is not exonerated by that circumstance. If it was negligence of the engineer alone—if the accident came to the plaintiff because of his misconduct alone, then the company will not be liable to the plaintiff because the engineer was in the situation of a fellow-servant; but the conductor is not in that situation. He is in the position of a chief, in the position of a principal having the management of affairs so far as the running of trains is concerned, and his authority over others upon the train is such that his negligence is regarded as that of his principal or the company. So now, if the negligence of the conductor contributed also to the injury, if the injury was in part due to him, the plaintiff may have his action; but if it was due entirely to the engineer, the locomotive man upon the engine, then the plaintiff cannot recover."

Eleventh. Because the court erred in overruling defendant's motion for new trial.

Wherefore, defendant prays that the judgment herein may be reversed.

TELLER, ORAHOOD & MORGAN,
Attorneys for Defendant.

Indorsed: No. 2680. Circuit court. James Callaghan *vs.* The Union Pacific Railway Company. Assignment of errors. Filed Dec. 29, 1892. Robert Bailey, clerk. Teller, Orahood & Morgan, attorneys for def't.

UNITED STATES OF AMERICA, } ss:
District of Colorado, }

I, Robert Bailey, clerk of the circuit court of the United States for the district of Colorado, do hereby certify the above and foregoing to be a true, perfect and complete transcript and copy of the complaint, summons, demurrer to complaint, answer, bill of exceptions, bond on writ of error, assignment of error, judgment and all orders heretofore filed or had and entered of record in said court, and in a certain cause lately in said court pending, wherein James Callaghan

47 was plaintiff and The Union Pacific Railway Company was defendant as fully and completely as the same still remain on file and of record in my office at Denver.

Seal of United States Circuit Court, District of Colorado.

In testimony to the above I do hereunto sign my name and affix the seal of said court, at Denver, in said district, this 17th day of January, A. D. 1893.

ROBERT BAILEY, *Clerk.*

Filed Feb. 11, 1893.

JOHN D. JORDAN, *Clerk.*

48 And on the sixteenth day of February, A. D. 1893, an appearance of counsel for plaintiff in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES CALLAGHAN. } No. 248.

The clerk will enter my appearance as counsel for the plaintiff in error.

(Signed) JOHN M. THURSTON.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1892. No. 248. Union Pacific Railway Company, plaintiff in error, *vs.* James Callaghan. Appearance. Filed Feb. 16, 1893. John D. Jordan, clerk. John M. Thurston, counsel for plaintiff in error, Omaha, Neb.

And on the sixteenth day of February, 1893, an appearance of counsel for defendant in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1892.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JOHN CALLAHAN, Defendant in Error. } No. 248.

The clerk will enter my appearance as counsel for the defendant in error.

(Signed) CHAS. HARTZELL AND
T. M. PATTERSON AS
HARTZELL & PATTERSON.

49 (Endorsed:) U. S. circuit court of appeals, eighth circuit, December term, 1892. No. 248. Union Pacific Railway

Company, plaintiff in error, *vs.* John Callahan. Appearance. Filed Feb. 16, 1893. John D. Jordan, clerk. Charles Hartzell & T. M. Patterson, Denver, Col., counsel for defendant in error.

And on the thirty-first day of May, A. D. 1893, an appearance of counsel for defendant in error was filed in said cause in the words and figures following, to wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1893.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES CALLAGHAN, Defendant in Error. } No. 248.

The clerk will enter my appearance as counsel for the defendant in error.

C. S. THOMAS.
(Signed) W. H. BRYANT.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1893. No. 248. Union Pacific Railway Company, plaintiff in error, *vs.* James Callaghan. Appearance. Filed May 31, 1893. John D. Jordan, clerk. C. S. Thomas, W. H. Bryant, counsel for defendant in error.

And on the 3rd day of June, A. D. 1893, in the record of the proceedings of said court is an entry of the submission of said
50 cause in the words and figures following, to wit:

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES CALLAGHAN, Defendant in Error. } No. 248.

In error to the circuit court of the United States for the district of Colorado.

This cause having been called for hearing, argument was commenced by Mr. Willard Teller, of counsel for plaintiff in error, continued by Mr. W. H. Bryant, of counsel for defendant in error, and concluded by Mr. William Teller, on behalf of plaintiff in error.

Thereupon this cause was submitted to the court upon the transcript of record from said circuit court and the briefs of counsel filed herein.

And on the 10th day of July, A. D. 1893, an opinion of the said United States circuit court of appeals was filed in said cause; which said opinion is in the words and figures following, to wit:

51 United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1893.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES CALLAGHAN, Defendant in Error.

No. 248. In Error to the Circuit Court of the United States for the District of Colorado.

Before Sanborn, circuit judge, and Shiras and Thayer, district judges.

Statement.

On the 18th day of August, 1890, a repair train operated by The Union Pacific Railway Company, the plaintiff in error, hereafter called the defendant, fell through a defective bridge and James Callaghan, the defendant in error, hereafter called the plaintiff, who was riding upon it, was injured. He sued the defendant for negligence in the operation of this train and recovered judgment upon the verdict of a jury, and it is to reverse this judgment that this writ of error was sued out. The train was running from the city of Trinidad to the town of Trinchera, in the State of Colorado. It consisted of five flat cars loaded with timbers to be used in repairing bridges on the road over which it was running. three box cars, and a caboose. Heavy storms had prevailed during the week preceding the accident, had caused extensive washouts and had damaged the road-bed and bridges so that none but repair trains had passed over this railroad between Trinidad and Trinchera for three days. The plaintiff was section foreman on a branch railroad which extends from Trinidad to Sopris. On August 17th he was ordered by defendant's superintendent to take all the men on his section and assist in repairing the main road between Trinidad and Trinchera. He boarded the repair train, which was in charge of one De Remer, at Trinidad, and at five p. m. on that day the train left that place for Trinchera. It proceeded slowly through the night. The track foreman and De Remer walked with a lantern in front of the train a large portion of the night. Before morning they found one bridge washed out and another rendered dangerous by floods and repaired them. The bridge
52 where the accident occurred was about one-half mile north of Trinchera and three miles south of Adair, which was a station on this railroad. Fifteen feet of the bank on each side of this bridge had been washed away so that it was not safe for trains to go over it. The section foreman of the section in which the bridge was situated had discovered its condition the day before the accident and had caused the usual danger signal, a red flag, to be placed in the space between the rails about seven hundred feet north of the bridge. When this repair train reached Adair it was running about fifteen miles an hour. The foreman of this section was at the station of Adair; he signaled the train to stop, and if it had stopped he would have informed the men in charge of it of the condition of the bridge

and of the danger from it. The engineer saw his signal, responded to it, and slacked the speed of the train to about four miles an hour, when the conductor signaled him to go ahead and he went on before the section foreman could give any information to the men upon the train.

One of the rules of the defendant is:

"In case of an extraordinary rainstorm or high water, trains must be brought to a stop, and a man sent out to examine bridges, trestles, culverts and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping places, and, when thought advisable, make extra stops to ascertain the extent and severity of storms, taking no risk."

The bridge was visible and its condition apparent for about nine hundred feet north of it on the railroad, but the engineer apparently saw neither the flag nor the damage to the bridge, but drove his train upon it, and the car on which the plaintiff was riding went through it and injured him.

The court charged the jury that if the plaintiff's injury was caused by the negligence of the engineer alone he could not recover because the latter was his fellow-servant, but if the negligence of the conductor in refusing to stop at Adair or in failing to stop the train before entering upon the bridge contributed to the injury, the defendant was liable for the damages. All the errors assigned may be fairly said to relate to the last clause of this instruction.

Mr. Willard Teller (Mr. H. M. Orahood, Mr. E. B. Morgan and Mr. J. M. Thurston were with him on the brief), for plaintiff in error.

Mr. W. H. Bryant (Mr. C. S. Thomas was with him on the brief), for defendant in error.

SANBORN, circuit judge, delivered the opinion of the court:

Under the decision of the supreme court in Railroad Company *v.* Ross, 112 U. S. 377, it must be held that so far as this plaintiff was concerned the conductor of this train was the defendant's vice-principal, and that the railway company was liable for any damage to the plaintiff caused by his negligence.

53 It is also well settled that a master is liable for an injury to a servant which is caused by his own negligence and the concurrent negligence of a fellow-servant. Grand Trunk Railway Co. *v.* Cummings, 106 U. S., 700, 702; Harriman *v.* Railway Company, 45 O. St., 11, 32; Lane *v.* Atlantic Works, 111 Mass., 136; Griffin *v.* Boston & Albany R. R. Co., 148 Mass., 143, 145; Cayzer *v.* Taylor, 10 Gray, 274; Elmer *v.* Locke, 135 Mass., 575; Booth *v.* Boston & Albany R. R. Co., 73 N. Y., 38; Cone *v.* Delaware, Lackawanna & Western R. R. Co., 81 N. Y., 206.

But in every such case the negligence of the master must be the proximate cause of the injury, and the burden is on the plaintiff to prove such acts of carelessness on his part as constitute the immediate cause of the accident. No act contributes to an injury in the legal acceptation of that term unless it is a proximate cause of that

injury, unless it is near to it in the order of causation. Jacobus *v.* St. Paul & Chicago R'y Co., 20 Minn., 125, 134.

The court below carefully instructed the jury that the plaintiff could recover only in case they found (1) that the conductor failed to exercise ordinary care in refusing to permit the train to stop when signaled at Adair or in failing to stop it before it entered upon the bridge, and (2) that this negligence was the cause of the injury; but that in case they found both of these issues against the defendant they might render a verdict for the plaintiff. The contention of the defendant is that it conclusively appears from the evidence that the accident was not the natural and probable consequence of the negligence of the conductor, but that the subsequent carelessness of the engineer who failed to see the danger signal on the track or the damage to the bridge and failed to stop his train before he drove upon it was an independent intervening cause which the conductor could not have anticipated and from which the accident in reality resulted. They urge that the conductor's order to proceed at Adair was only a direction to the engineer to proceed slowly and carefully, to stop before passing any bridges or trestles so that a man could be sent out to examine them, and generally to proceed carefully according to the rules of the company; and they insist that the conductor could not have anticipated that the engineer would commit a breech of his duty, violate the rule in evidence, and dash upon the bridge without stopping to examine it. This argument is persuasive and worthy of consideration.

In Chicago, St. Paul, Minneapolis & Omaha R'y Co. *v.* Elliott, —— Fed. Rep., ——, we had occasion to consider the rule of law here invoked, and there said:

"An injury that is the natural and probable consequence of an act of negligence is actionable. But an injury that could not have been foreseen or reasonably anticipated as the probable result of the negligence is not actionable, nor is an injury that is not the natural consequence of the negligence complained of and that would not have resulted from it but for the interposition of some new independent cause that could not have been anticipated."

The questions in this case then are, was it so clear that the accident could not have been reasonably anticipated from the
54 conductor's violation of the rule, or was it so clear that the accident was the result of a cause independent of the conductor's negligence and subsequently intervening, that the court should have withdrawn these questions from the jury, for it was the province of the jury to determine these questions if they were doubtful. If there was evidence in the case from which reasonable men might fairly conclude that the negligence of this conductor was the proximate cause of the injury, the court properly submitted these questions to the decision of the jury.

In Milwaukee & St. Paul R'y Co. *v.* Kellogg, 94 U. S., 469, 474, 476, Mr. Justice Strong, who delivered the opinion of the court, said:

"The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science

or of legal knowledge. * * * In the nature of things, there is in every transaction a succession of events more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dissevered by new and independent agencies, and this must be determined in view of the circumstances existing at the time."

In considering these questions it must also be borne in mind that the proximate cause is not always nor generally the act or omission nearest in time or place to the effect it produces.

In the sequence of events there are often many remote or incidental causes nearer in point of time and place to the effect than the moving cause, and yet subordinate to and often themselves influenced if not produced by it. Thus a defect in the construction of a boiler of an engine may long exist without harm and yet finally be the proximate cause of an explosion, to which the negligence of an engineer, the climate and many other incidental causes nearer by years to the effect may contribute.

Cases illustrating this proposition are Milwaukee & St. Paul R. R. Co. *v.* Kellogg, *supra;* Insurance Company *v.* Boone, 95 U. S., 117, 130; Lynch *v.* Nurdin, 1 Q. B., 29; Illidge *v.* Goodwin, 5 C. & P., 190, 192; Clark *v.* Chambers, L. R. 3 Q. B., Div. 327; Pastene *v.* Adams, 49 Cal., 87.

Again, an effect is usually the result of many causes, some proximate, others remote. The rule by which the former are to be separated from the latter is admitted by all to be difficult of application, and the best that can be done is to carefully apply it to the circumstances of each case as it arises.

Bearing in mind the rules and consideration to which we have thus briefly a-verted, let us now consider whether or not reasonable men might fairly conclude under all the facts and circumstances of this case that the negligence of this conductor was the proximate cause of the disaster. The train came into Adair at five o'clock in the morning at a speed of fifteen miles an hour. Extraordinary storms and floods had caused the destruction of bridges and parts of the roadbed from Trinidad to Trinchera. The force of men upon this train had found and repaired two dangerous bridges during the night before. The conductor and engineer knew the dangerous condition of the road and had been moving over it during the night behind two pe-
55 destrians who carried lanterns. The defective bridge was three miles south of Adair and between that place and the next station. The foreman of the section, who was aware of the defect and danger, signaled the train to stop so that he might tell the men in charge of it of the danger ahead, the engineer slackened his speed to four miles an hour, when the conductor ordered him to go on. He increased his speed—the conductor did not countermand his order—the engineer continued to obey it, ran upon the bridge and it fell. The conductor must have known where that bridge was. What then was the natural and probable consequence of running by the station where the section foreman was waiting to give in-

formation and upon such a bridge without inquiry or examination after the disastrous floods and washouts of which he was aware? It was disaster, destruction of property and of life. It seems to us that these were the results the conductor might reasonably have anticipated, from his acts; they were the results he ought to have anticipated, the results that a reasonably prudent man would have anticipated. Indeed, the managers of the defendant corporation who established its rules did anticipate these very results as the natural and probable consequence of such a course of action. It was because they anticipated them that they prohibited this course of action and enacted the rule that conductors should make inquiries at all stopping places and take no risk, and that trains should be brought to a stop and a man sent out to examine each bridge and trestle before passing over it in cases of such storms and floods as this in question.

But it is urged that the negligence of the conductor was not in fact the proximate cause of the accident, but that it resulted from an independent intervening cause, viz: the failure of the engineer to see the danger signal and to stop the train himself at the bridge. There are several answers to this proposition:

First. We are unable to say from this evidence that the negligence of the engineer was an independent cause; it may have been dependent upon the negligence of the conductor; it may have been induced or caused by the latter. The conductor directed the movements of this train; the duty of the engineer was to obey his orders. When he undertook to stop at the signal of the section foreman, that the conductor might make inquiries that he was required to make by the rule as to the road before them, the engineer was ordered to proceed. He had been running his train fifteen miles an hour but had slackened its speed to four miles an hour when he received this order. He may have inferred and probably did infer, that the conductor had in some way learned that there was no danger ahead, that the rule in evidence no longer applied to this train, and hence that there was no need to stop to inquire, and that he could safely rush on at the speed that he had been making, and thus the action of the conductor may have lulled him into the fatal security that induced his carelessness.

Second. The negligence of the engineer was not an intervening cause that interrupted or turned aside the natural sequence of events or prevented the natural and probable effect of the conductor's negligence. It simply failed to interpose the engineer's care to prevent this probable result and left the natural sequence of events to
56 flow on undisturbed to the fatal effect. It may be true that if the engineer had seen and obeyed the danger signal on the track or had seen the damage to the bridge and had stopped the train the accident would not have happened, but his failure was but the concurring or succeeding negligence of a servant which permitted the conductor's breach of duty to work out undisturbed the disastrous result of which it was the primary and efficient cause. Moreover, we are unwilling to say that this conductor ought not to have anticipated the negligence of the engineer. He had ordered him to

assist him in his own breach of duty, in disobeying the rule of the company requiring him to stop at Adair and inquire, and we are unable to say but that he ought to have foreseen that this order would be taken by the engineer as a communication that the rule in evidence was no longer applicable to their train. However this may be, the negligence of this engineer did not so break the sequence of events between the negligence of the conductor and the accident as to relieve the defendant.

The independent intervening cause that will prevent a recovery on account of the act or omission of a wrong-doer must be a cause which interrupts the natural sequence of events, turns aside their course, prevents the natural and probable result of the original act or omission and produces a different result that could not have been reasonably anticipated. The concurrent or succeeding negligence of a fellow-servant or a third person which does not break the sequence of events is not such a cause and constitutes no defense for the original wrong-doer, although in the absence of the concurrent or succeeding negligence the accident would not have happened. Martin *v.* North Star Iron Works, 31 Minn., 407, 410; Burrows *v.* March Gas & Coke Co., L. R., 5 Exch., Cases 67; Ricker *v.* Freeman, 50 N. H., 420.

We have now stated the reasons which have led us to the conclusion that the court below submitted the questions at issue to the jury under proper instructions. For the same reasons we are of the opinion that there was no error in its refusal of the defendant's requests.

It is claimed in the argument that the negligence of the conductor was not properly pleaded, but the complaint states, "That the said accident resulted and was caused entirely by the negligence, carelessness and recklessness of the said officers of the said company, together with the conductor and engineer in charge of the train on which plaintiff was riding," and no objection was made to the introduction of any of the evidence on which the verdict was based. In view of these facts we think the pleading is now sufficient, and the judgment below is affirmed with costs.

Filed July 10, 1893.

57 And on the tenth day of July, A. D. 1893, in the record of the proceedings of the said United States circuit court of appeals is an entry of judgment in said cause in the words and figures following, to wit:

UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES CALLAGHAN, Defendant in Error. } No. 248.

In error to the circuit court of the United States for the district of Colorado.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Colorado, and was argued by counsel.

On consideration whereof it is hereby ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed with costs, and that James Callaghan recover against the Union Pacific Railway Company the sum of twenty dollars for his costs herein and have execution therefor.

July 10, 1893.

And on the 12th day of August, A. D. 1893, the plaintiff in error, by its counsel, filed in said cause an assignment of error in the words and figures following, to wit:

In the Supreme Court of the United States.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
JAMES CALLAGHAN, Defendant in Error.

Writ of error to the circuit court of appeals of the eighth circuit.

Now comes the said plaintiff in error, The Union Pacific Railway Company, and says that in the record and proceedings herein of the said circuit court of appeals for the eighth circuit there is manifest error, in this, to wit:

58 1st. The said circuit court of appeals erred in holding that under the decision of the Supreme Court in R. R. Co. *vs.* Ross, 112 U. S., 377, "it must be held in the case at bar that, so far as plaintiff was concerned, the conductor of the train was the defendant's free principal, and that the railway company was liable for any damage to the plaintiff caused by his negligence" (page 52, Record).

2nd. The said circuit court of appeals erred in holding that the circuit court did not err in refusing to instruct the jury at the request of the defendant and at the close of the evidence on the part of the plaintiff and defendant that there was not sufficient evidence to warrant the jury in finding a verdict for the plaintiff for these reasons:

First. Not sufficient evidence of negligence of the defendant in causing the injury.

Second. Contributory negligence on the part of the plaintiff.

Third. Negligence of fellow-servant (p. 56, Record).

3rd. The court erred in holding that the natural or probable result of the conductor's act in refusing to stop at Adair was disaster, destruction of property or of life, and in holding that the establishment of rules to prevent accidents in such cases showed that running past a station without stopping, though signalled to stop, showed the company anticipated danger from such an act.

4th. The court of appeals erred in holding that the negligence of the conductor was the proximate cause of the injury to plaintiff in the court below.

5th. The court erred in holding that the negligence of the engi-

neer in not observing the rule of the company and in not heeding signal flags which warned him of danger and in running onto the bridge without observing its condition, the bridge being in plain sight, was not the proximate cause of the injury.

6th. The court of appeals erred in holding that the unde-
59 niable negligence of the engineer in discharge of his duties (duties not arising in any respect out of the directions or orders of the conductor, but existing independent of all orders of the conductor) was not at time and place when and where the accident happened an independent, efficient cause intervening between the act of the conductor alleged to have been negligent and the injury.

7th. The court of appeals erred in holding that "an inde-
60 pendent intervening cause that will prevent a recovery for or on account of an act or omission of a wrong-does must be a cause which interrupts the natural sequence of events, turns aside the cause, and prevents the probable result of the original act or omission and produces a different result that could not have been reasonably anticipated, and that the concurrent or succeeding negligence of a fellow-servant which does not break the sequence of events is not such a cause and constitutes no defense for the original wrong-doers, though in the absence of such concurrent negligence the accident would not have happened."

8th. The court of appeals erred in holding that the negligence of the engineer did not so break the sequence of events between the negligence of the conductor, if negligence there was in the conductor, and the accident as to relieve the defendant.

9th. The court of appeals erred in holding that the court below did not err in instructing the jury "that if the red flag was up when the engineer came to the place of danger and he did not see and did not look for it, though he knew it was a time of danger, and there was negligence on his part and also negligence on the part of the conductor, the plaintiff might recover."

10th. The court of appeals erred in holding that the court below committed no error in instructing the jury that "if negligence of the conductor contributed to the injury, if the injury was due in part to him, the plaintiff may have his action."

11th. The court of appeals erred in affirming the judgment of the circuit court.

Wherefore the said plaintiff in error prays that the judgment of the court of appeals be reversed and that the judgment of the said circuit court of the United States for the district of Colorado be reversed, and that the said court be ordered to enter judg*emtn* for the plaintiff in error and against the defendant in error, and that the said plaintiff in error recover its costs in this case in each of said courts as well as in this honorable court.

(Signed) J. M. THURSTON,
WILLARD TELLER,
H. M. ORAHOOD,
Attorneys for Plaintiff in Error.

61 (Endorsed:) No. 248. In the Supreme Court of the United States. The Union Pacific Railway Company, plaintiff in

error, *vs.* James Callaghan, defendant in error. Assignment of errors. Filed Aug. 12, 1893. John D. Jordan, clerk. John M. Thurston, Willard Teller, H. M. Orahood, attorneys for plaintiff in error.

And on the 23rd day of August, A. D. 1893, a supersedeas bond and writ of error was filed in said cause; which said bond is in the words and figures following, to wit:

Know all men by these presents that we, The Union Pacific Railway Company, as principal, and The Lawyers' Surety Company of New York, a corporation duly organized under the laws of the State of New York, but doing business in Boston, in the county of Suffolk and Commonwealth of Massachusetts, as surety, are held and firmly bound unto James Callaghan, his heirs, executors, and administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at the May term, A. D. 1893, of the United States circuit court of appeals for the eighth circuit, on the tenth day of July, A. D. 1893, in a suit depending in said court between The Union Pacific Railway Company, as plaintiff in error, and James Callaghan, defendant in error, judgment was rendered against said The Union Pacific Railway Company, and the said The Union Pacific Railway Company has obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said James Callaghan, citing and admonishing him to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the date of said citation:

Now, the condition of the above obligation is such that if said The Union Pacific Railway Company shall prosecute said
62 writ of error to effect and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE UNION PACIFIC RAILWAY COMPANY,
By OLIVER W. MINK, *Second Vice-Pres.*
THE LAWYERS' SURETY COMPANY OF N. Y.,
By FELIX RACKEMANN,
Resident Vice-President.
JOSEPH G. STEARNS,
Resident Ass't Secretary.

Attest: ALEX. MILLAR, *Sec.*
GEORGE D. AYERS, *To L. S. Co.*

Sealed and delivered in presence of—
W. A. FINNEY.
F. W. HILL.

Aug. 17, 1893.

The foregoing bond is approved as a supersedeas.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) U. S. circuit court of appeals, eighth circuit, May term, 1893. No. 248. Union Pacific Railway Company, plaintiff in error, *vs.* James Callaghan. Supersedeas bond on writ of error. Filed Aug. 23, 1893. John D. Jordan, clerk.

And on the 23rd day of August, A. D. 1893, a writ of error from the Supreme Court of the United States to the said circuit court of appeals was filed in the clerk's office in the said court; the original of which writ of error, with the clerk's return endorsed thereon, is hereto attached and herewith returned.

63 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the eighth circuit, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, eighth circuit, before you, at the May term, 1893, thereof, between The Union Pacific Railway Company, plaintiff in error, and James Callaghan, defendant in error, a manifest error hath happened, to the great damage of the said Union Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the said record and proceedings aforesaid at the city of Washington, D. C., and filed in the office of the clerk of the Supreme Court of the United States on or before the 16th day of September, 1893, to the end that, the record and proceedings aforesaid being inspected, the Supreme Court of the United States may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

Issued at office, in the city of Washington, D. C., with the seal of the Supreme Court of the United States.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk Supreme Court United States.

Allowed by—
DAVID J. BREWER,
Associate Justice.

64 *Return to Writ of Error.*

UNITED STATES OF AMERICA, }
Eighth Circuit, } ss:

In obedience to the command of the within writ I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In witness whereof I hereto subscribe my name and affix the seal of said United States circuit court of appeals, at office, in the city of St. Louis, Mo., this 2d day September, A. D. 1893.

JOHN D. JORDAN,
Clerk of the U. S. Circuit Court of Appeals, Eighth Circuit.

65 [Endorsed:] In U. S. circuit court of appeals, eighth circuit. The Union Pac. R'y Co., plaintiff in error, *vs.* James Callaghan, def't in error. Writ of error. Filed Aug. 23, 1893. John D. Jordan, clerk. Original.

66 And on the 28th day of August an original citation, with return of service endorsed thereon, was filed in the clerk's office of said circuit court of appeals; which said original citation is hereto attached and herewith returned:

67 The United States of America to James Callaghan, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, D. C., thirty days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the eighth circuit wherein The Union Pacific Railway Company was plaintiff in error and you were defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17th day of August, in the year of our Lord one thousand eight hundred and ninety-three.

DAVID J. BREWER,
Associate Justice of the Supreme Court of the United States.

Received copy of above citation this 23rd day of August, A. D. 1893.

W. H. BRYANT,
Attorney for Defendant in Error.

68 [Endorsed:] In U. S. circuit court of appeals, eighth circuit. The Union Pac. R'y Co., plaintiff in error, *vs.* James Callaghan, def't in error. Citation. Filed Aug. 28, 1893. John D. Jordan, clerk. Original.

69 *Clerk's Certificate.*

United States Circuit Court of Appeals for the Eighth Circuit.

I, John D. Jordan, clerk of the above-named court, do hereby certify that the foregoing transcript, consisting of 68 pages, contains a full, true, and complete copy of order, the papers, pleadings, and proceedings, including the opinion of said circuit court of appeals, in a certain cause adjudicated in said court wherein The Union Pacific Railway Company was plaintiff in error and James Callaghan was defendant in error, No. 248, May term, A. D. 1893, as full, true, and complete as the originals of the same now remain on file and of record in my office.

Seal United States Circuit Court of Appeals, Eighth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of St. Louis, Mo., this 2nd day of Sept., A. D. 1893.

JOHN D. JORDAN,
Clerk U. S. Circuit Court of Appeals, Eighth Circuit.

Endorsed on cover: Case No. 15,390. U. S. circuit court of appeals, 8th circuit. Term No., 271. The Union Pacific Railway Company, plaintiff in error, *vs.* James Callaghan. Filed September 11, 1893.

Office Supreme Court U. S.
FILED.
DEC 4 1895
JAMES H. McKENNEY,
CLERK.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
ANNA CALLAGHAN AND OTHERS,
Defendants in Error.

No. 271.

Brief and Argument of Defendants in Error,

ON MOTION TO VACATE THE SUPERSEDEAS AND DISMISS THE WRIT OF ERROR OR AFFIRM THE JUDGMENT.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendants in Error.

CLARK & REID, PRINTERS, 1335 LAWRENCE ST., DENVER.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

THE UNION PACIFIC RAILWAY COMPANY, *Plaintiff in Error,* vs. ANNA CALLAGHAN AND OTHERS, *Defendants in Error.*	*No. 271.*

Brief and Argument of Defendants in Error,

ON MOTIONS TO VACATE THE SUPERSEDEAS AND DISMISS THE WRIT OF ERROR OR AFFIRM THE JUDGMENT.

The defendants in error in this cause have filed two motions, one to vacate the *supersedeas*, and the other to dismiss the writ of error or affirm the judgment. The case was originally commenced in the Circuit Court of the United States for the District of Colorado. It was brought by James Callaghan against The Union Pacific Railway Company. The jurisdiction of the Federal Court was invoked upon the ground that the plaintiff was a citizen of Colorado and the defendant a corporation organized under the laws of Congress. The substantial facts of the case, as disclosed by the record presented to the Circuit Court of Appeals, are as follows:

On the 18th of August, 1890, a repair train, operated by The Union Pacific Railway Company, went through a defective bridge near Trinchera, Colorado, and James Callaghan, who was riding upon the train, was injured. The

train was running from the city of Trinidad to the town of Trinchera, and consisted of five flat cars, loaded with timbers to be used in repairing bridges along the road over which it was running, three box cars and a caboose. Heavy storms had prevailed during the week preceding the accident, along the entire line of road in that district, and had caused extensive washouts, damaging the road-bed and bridges, so that none but repair trains had passed over this portion of the line, between Trinidad and Trinchera, for three days. The plaintiff was a section foreman on a branch railroad which extended from Trinidad to Sopris, being entirely distinct from the line running to Trinchera. Some time on August 17th, he received orders from the Superintendent of The Union Pacific Railway Company to take all the men on his section and assist in repairing the main line between Trinidad and Trinchera. He at once went to Trinidad, where he was joined by several other section foremen, with their crews, together with various other employees, all of whom were in charge of one DeRemer, who was a contractor employed by the company, but who had been called in to assist in repairing the road, and about 5 P. M. on that day the train left Trinidad for the South. DeRemer had charge of all the men upon the train who were engaged in repairing the road, but had no control over the train crew, consisting of the conductor, engineer, fireman and brakeman. The train left Trinidad, pursuant to orders received from the Superintendent, who was stationed at that time at Trinchera. He had that day examined the bridge, which subsequently fell, but he gave no orders or warning of any kind, either to DeRemer or the train crew, concerning the condition of the bridge. The train proceeded slowly during the night, DeRemer and the track walker going in front with a lantern most of the

time. Before morning they found one bridge washed out and another rendered dangerous, and repaired them. The bridge where the accident occurred was about one mile north of Trinchera and three miles south of Adair, which was another station on this road. Fifteen feet of the bank on each side of the bridge had been washed away several days before, so that it was not safe for trains to go over it. The section foreman of this section in which the bridge was located had discovered its condition the day before the accident, and had caused the usual danger signal, a red flag, to be placed along the line of the road between the rails, at a point about 700 feet north of the bridge; but the Superintendent and roadmaster of the company, who had also discovered its condition before the train had left Trinidad, never gave any warning or notice of any description to the persons in charge of the train, or took any steps to prevent them running on the bridge. When the train reached Adair, it was running about fifteen miles an hour. The foreman of this section was at the station at Adair, and signaled the train to stop for the purpose of telling them about the bridge, and if it had stopped, he would have informed the men in charge of its condition. The engineer saw his signal, and commenced to stop the train, and had slowed up to about four miles an hour when the conductor signaled him to go ahead. The train then went on, without giving the section foreman any opportunity to inform those upon the train concerning the danger. The bridge could be seen for about 900 feet north of it on the road, but the engineer neither saw the condition of the bridge nor the red flag, but drove his train upon it, and the car upon which the plaintiff was riding went through. No effort was made by the conductor to stop the train at any time for information as to the condition of the bridge.

One of the rules of the defendant company introduced in evidence by it and shown to be the one under which the engineer and conductor were operating this train was as follows:

"In case of an extraordinary rain storm or high water, trains must be brought to a stop, and a man sent out to examine bridges, trestles, culverts and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping-places, and, when thought advisable, make extra stops to ascertain the extent and severity of storms, taking no risk. In case of doubt as to the safety of proceeding, they will place their trains upon a siding, and remain there until certain it is safe to proceed."

This suit was brought on the 8th day of August, 1891; was tried on the 25th day of May, 1892, resulting in a verdict for the plaintiff in the sum of $4,500. Motion for new trial was overruled, and the case duly appealed to the Circuit Court of Appeals, where it was heard on the 3d day of June, 1893, and determined on the 10th day of July, 1893, the judgment of the Court below being affirmed. The Railroad Company then sued out this writ of error. Afterwards, the defendant in error, James Callaghan, was killed by being run over by an engine in charge of the same engineer who was upon the train at the time it went into the bridge on the 18th of August, 1890. His heirs and representatives have been substituted in this Court.

I.

MOTION TO VACATE SUPERSEDEAS.

This motion is based upon the peculiar character of the bond, which was inadvertently approved by Judge Brewer. Rule 29 of this Court provides as follows:

"Supersedeas bonds in the Circuit Courts must be taken, with good and sufficient security, that the plaintiff in error or appellant shall prosecute his writ or appeal to effect, and answer all damages and costs if he fail to make his plea good. Such indemnity, where the judgment or decree is for the recovery of money not otherwise secured, must be for the whole amount of the judgment or decree, including just damages for delay, and costs and interest on the appeal."

The undertaking accepted as a supersedeas bond in this case does not comply with the requirements of this rule. There is no penal sum in any amount whatever mentioned in the bond, and it is not stated that the judgment is to be paid by the surety in case the writ of error is not prosecuted with effect. The only condition of the bond is that The Union Pacific Railway Company shall prosecute its writ of error to effect, and answer all damages and costs. We do not think the bond is worth anything, but even if it should be held good to cover the damages and costs of the writ, this would not cover the payment of the judgment. In the best view that can be taken of it, it is nothing more nor less than a bond for costs. The penal clause of the bond is as follows:

"KNOW ALL MEN BY THESE PRESENTS, That we, The Union Pacific Railway Company, as principal, and The Lawyers' Surety Company of New York, a corporation duly organized under the laws of the State of New York, but doing business in Boston, in the County of Suffolk

and Commonwealth of Massachusetts, as surety, are held and firmly bound unto James Callaghan, his heirs, executors and administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally, by these presents."

Then follow the recitals in regard to the rendition of judgment, after which follows the condition of the bond, which is as follows:

"Now, the condition of the above obligation is such that if said The Union Pacific Railway Company shall prosecute said writ of error to effect and answer all damages and costs, if it shall fail to make good its plea, then the above obligation to be void, else to remain in full force and effect."

Printed transcript, p. 51.

It has been held that a bond of this kind, without naming any penal amount, is absolutely void.

St. Louis, etc., Railway Co. vs. Morse, 50 Kan., 99.

Section 1007 of the Revised Statutes provides that a supersedeas can only be obtained by giving the security provided by law. The security provided by law means a bond in a sufficient sum to pay the judgment complained of, together with all interest, costs and damages for delay. The security here given, if it is any security whatever, is simply for damages and costs, and does not cover the principal sum or interest.

Kountze vs. Omaha Hotel Co., 107 U. S., 378.

Jerome vs. McCarter, 21 Wall., 17.

Hudson vs. Parker, 156 U. S., 277.

II.

MOTION TO DISMISS THE WRIT OF ERROR.

Our motion to dismiss is based upon four grounds—*first*, that no bond was taken upon the allowance of the writ of error; *second*, that no exception has been reserved to the judgment of the Circuit Court of Appeals, nor to any opinion rendered by said Court; *third*, there is no assignment of errors, as required by the rules of this Court, and *fourth*, that the writ of error has been sued out for the purposes of delay.

First—Upon the first point, that no bond was taken, we rely mainly upon the matter just discussed in the motion to vacate the *supersedeas*. We contend that a bond of this character, under the authority of the Kansas case above cited and the decisions of this Court, is absolutely void, and is, therefore, no bond at all.

The case of Gay vs. Parport, 101 U. S., 391, does not sanction a bond of this character. As we understand that case, it related only to the condition of the bond, and no point was raised as to the amount of the penalty, or that no amount at all had been inserted.

The case of Jerome vs. McCarter, 21 Wall., 17, reviewing the earlier cases of this Court, and recently affirmed in 156 U. S., 277, lays down the proposition that all bonds must be taken in a certain penal sum. If this conclusion is not directly affirmed by the Court, it seems necessarily to result from the opinion rendered. As that was a case argued upon one side by Senator Edmunds and upon the other by Senator Carpenter, we can rest assured that every proposition necessary to enlighten the Court upon both sides was fully presented, and we are satisfied that the Court reached the conclusions it did only after a most careful and conscientious review of the

facts. So we contend, and we think this Court will unquestionably hold with us, that there was no bond whatever given upon obtaining the writ of error in this case. The statute was, therefore, not complied with, and the writ should be dismissed for this reason.

Second—The next ground upon which we ask that the writ be dismissed is, that there is no exception reserved to the judgment of the Circuit Court of Appeals, and no bill of exceptions bringing up the judgment and opinion of that Court. Upon this point we confess that we are practically without authority. The rule at common law which has been enforced by this Court and the Courts of, practically, all of the States, is that an exception must be reserved to the judgment of a Court, where the entire matter is submitted to the Court, and it passes upon the law and the facts. The question of reserving an exception to the judgment of an intermediate Court of Appeals does not seem, so far as we have been able to find, ever to have been raised; but we can see no reason why any different rule should be adopted concerning the judgments of these Courts than is applied to the judgments of other Courts. They sit for the purpose of passing upon the record and determining the correctness of the decisions of lower Courts. They pass, in a measure, upon the evidence set out in the record before them, and determine both the law and the facts. While this is, perhaps, not strictly true in law cases, it is certainly true in equity suits, but it is measurably true in both. They are at liberty to enter a judgment and enforce it by a decree of their own, or remand a case to the lower Court, with instructions to have its mandate enforced. It seems to us that a party who objects to their decisions should say so when they are announced. He can do this by saving an exception to the judgment of the Court, pre-

senting a bill of exceptions embodying the points upon which he relies, and thus preserve the matter for review in the higher Court. This reasoning is particularly true when it comes to presenting the opinion of an intermediate appellate Court to a higher Court for review. While the judgment itself of the intermediate Court is a part of the record, the opinion is not. Thus the record in this case states that on the 10th day of July, 1893, an opinion of the said United States Circuit Court of Appeals was filed in said cause; and then follows a copy of the opinion; but there is nothing stated to the effect that this opinion was spread upon the records of the Court, or became a part of the record, while, in regard to the judgment, the following entry appears:

"And on the 10th day of July, A. D. 1893, in the record of the proceedings of the said United States Circuit Court of Appeals is an entry of judgment in said cause in the words and figures following, to wit."

Thus it will be seen that while the *opinion* is merely filed, the judgment itself is made a part of the record. We submit this proposition to the Court with some hesitation upon our own part, but with the conviction that there must be some rule established regulating the question of presenting the supposed errors of these intermediate Courts.

Third—The third point upon which we ask that the writ of error be dismissed is that there was no sufficient assignment of errors filed with said writ. This is based upon practically the same grounds as our previous motion. An assignment of errors was filed in the Circuit Court of Appeals on the 12th day of August, 1893, containing eleven assignments. The first ten relate to certain matters set forth in the opinion of the Circuit Court of Appeals. They do not go to the merits of this con-

troversy as disclosed by the record of the Circuit Court, or relate in any manner to the judgment rendered by the Circuit Court of Appeals. They simply state that that Court, in the language of its opinion, committed certain errors. For instance, the first assignment is as follows:

"First, the said Circuit Court of Appeals erred in holding that under the decision of the Supreme Court in Railroad Company vs. Ross, 112 U. S., 377, 'It must be held in the case at bar that, so far as plaintiff was concerned, the conductor of the train was the defendant's free (vice) principal, and that the Railway Company was liable for any damage to the plaintiff caused by his negligence.'"

Printed transcript of record, page 49.

This is merely an assignment of error upon the language used by the Circuit Court of Appeals in stating its reasons w y the judgment should be affirmed. There is no rule in this Court or any statute requiring the opinions of the Circuit Court of Appeals to become a part of the record. It is settled law that the opinions of a Judge of a Court, upon which he bases his conclusions, are wholly immaterial. It is the judgment entered which is to be looked at. We do not see how the opinion of the Circuit Court of Appeals or of any other appellate tribunal is of more sanctity than the opinion of any other Court. If error cannot be assigned upon the opinion of a Judge of the Circuit Court, we do not believe that it can be assigned upon the opinion of three Judges of the Circuit Court of Appeals.

This brings us to the eleventh assignment of errors, which is that the Court of Appeals erred in affirming the judgment of the Circuit Court. This is a general assignment which this Court has universally refused to con-

sider. It presents nothing to this Court for review. It seems to us that the only way in which a proper assignment of errors can be prepared to a judgment of the Circuit Court of Appeals, is by stating that the Court erred in passing upon the record of the lower Court, in that it failed to consider those particulars wherein it was claimed the other Court erred. In other words, it should be a practical duplicate of the assignment of errors before the lower Court, with any additional error which it is claimed the intermediate Court committed. That is, in case the intermediate Court should improperly refuse to dismiss an appeal, to vacate a supersedeas, to allow an interlocutory application, or any matter of that kind pertaining peculiarly to the cause, while in that Court. The plaintiff in error in this suit, by failing to assign error here to the action of the lower Court, has, in our judgment, abandoned all those errors by simply assigning error upon the judgment of the Circuit Court of Appeals. He has attempted to present the entire record of the Court below, with all of his exceptions, saved during the trial. This is contrary to the rules of this Court and the statutes of the United States.

The fourth reason why the writ of error should be dismissed is that it is manifest that it has been sued out solely for purposes of delay. We will discuss this under a separate head.

III.

MOTION TO AFFIRM THE JUDGMENT.

We think it clear that a cursory examination of this record will show that this writ of error has been sued out solely for the purposes of delay, and that the judgment should be affirmed. Upon the merits of the case we are content to rely upon the very careful judgment of the

Circuit Court of Appeals, delivered by Judge Sanborn, and found in the record, commencing upon printed page 44; but, in addition to that, we desire to call the Court's attention to two or three matters urged upon the attention of the Circuit Court of Appeals when the case was before it.

First—That, at the trial of the cause—as appears by the bill of exceptions—no proper exception was ever saved to any of the instructions, nor is there a single exception in the record which presents any matter to an appellate Court. The record shows that not a single exception was saved during the introduction of evidence. After a portion of the defendant's testimony had been introduced, a motion was made to instruct the jury to find a verdict for the plaintiff upon the grounds that there was no evidence of negligence; that there was evidence of contributory negligence upon the part of the plaintiff, and that the injury resulted from the negligence of a fellow-servant. This motion was denied. The defendant then introduced further testimony, and the plaintiff offered to introduce certain testimony in rebuttal. This Court has frequently held that, after a motion of this kind is made and further testimony is introduced, all rights under the motion are thereby waived.

Union Ins. Co. vs. Smith, 124 U. S., 405.

At the conclusion of all the testimony, the defendant presented a series of instructions—four in number—found upon page 25 of the printed abstract. At the end of these instructions is this entry:

"But the Court refused to give each and every of said instructions, to which ruling of the Court the defendant, by its counsel, then and there duly excepted."

Thereupon the Court gave a lengthy charge to the jury, covering six printed pages of the transcript, and

embracing practically all the matters contained in these instructions. *Not a single exception was saved to these instructions given by the Court.* We contend, upon this, that there is no question presented by these instructions which can be considered by any appellate Court. Only a general exception having been saved to the refusal of the Court to give the four instructions asked, they are brought within the rule that, where a request of this kind is made, and any portion of the request is erroneous, the appellate Court will not review the action of the lower tribunal in refusing them as a whole.

Union Ins. Co. vs. Smith, 124 U. S., 405.

And, in addition to that, having requested instructions in this form, and then permitted the jury to be instructed generally concerning the matters set forth in the instructions, or any part of them, without saving any exception whatever to the general charge, is a complete waiver of any error committed in refusing to give the instruction requested. In other words, the defendant is in the position of requesting the Court to give certain instructions, and, upon its refusal, listening to the instructions actually given, and saying, "Very well; we are content to let the matter go as it is."

Under these conditions there is nothing for the appellate Court to review.

Beaver vs. Taylor, 93 U. S., 46.
Ayrault vs. The Pacific Bank, 47 N. Y., 570.
Walsh vs. Kelly, 40 N. Y., 556.
Requa vs. City of Rochester, 45 N. Y., 129.
Reagan vs. Akin, 138 U. S., 109.

Second—In the next place, it appears upon the whole record that the plaintiff in the Court below was entitled to judgment upon the undisputed facts in testimony. This testimony shows that the Superintendent of the de-

fendant company had knowledge of the condition of this bridge the day before the accident and before the train upon which the plaintiff was riding had started from Trinidad; that it left there under his orders, and that in giving these orders, not a word was said in regard to this bridge. The Superintendent had stood upon the bridge—examined it carefully before he had sent orders for the train to leave Trinidad. We contend that, under these circumstances, he was guilty of gross, if not criminal negligence in failing to give the conductor in charge of that train warning as to the condition of this bridge. The Circuit Court was of the opinion that this being a work train, the Superintendent was not required to give this warning, but we differ most decidedly with the Court in this view, and we think the following authorities sustain us in this position:

Sherman & Redfield on Negligence, Sec. 203.

Carlson vs. Oregon Railway Company, 21 Ore., 450.

Harrod vs. North Carolina Central Railroad Company, 74 N. C., 734.

Same case on rehearing, 76 N. C., 5.

This was, at any rate, a matter which should have been submitted to the jury.

Railroad Company vs. Ives, 144 U. S., 408, 417.

Upon the question of proximate cause and the matters discussed in the opinion of the Circuit Court of Appeals, we are perfectly willing to let it rest on the opinion of that Court. All the authorities cited by us are contained in that opinion, and the reasoning of Judge Sanborn upon the correctness of the action of the Court below in submitting these matters to the jury is unanswerable.

For this reason, we respectfully submit to this Court that this writ of error has been needlessly sued out, and this case should be affirmed. The record showing there was no exception saved to present any matter to the consideration of the Circuit Court of Appeals, and the Circuit Court of Appeals having affirmed the judgment, the only reason that can possibly be given for taking this case to this Court was simply to delay the payment of the judgment. The fact that the defendant company, within a short time after the writ was asked for, became insolvent, would indicate the same conclusion. This is a fact so connected with all the departments of the government, that this Court will take judicial knowledge of it. The records of this Court also show that several writs of error brought here at about the same time to review other judgments have been voluntarily dismissed.

We submit that the writ of error should be dismissed and the judgment affirmed with statutory damages.

Respectfully submitted.

C. S. THOMAS,

W. H. BRYANT,

Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
ANNA CALLAGHAN AND OTHERS,
Defendants in Error.

Motion to Vacate Supersedeas.

Come now the above named defendants in error and move this honorable Court that the *supersedeas* in the above entitled cause, which was allowed by the honorable David J. Brewer on the 17th day of August, A. D. 1893, be and the same is hereby vacated, for the reason that the bond given by the said Union Pacific Railway Company, upon which said *supersedeas* was allowed, is void and of no effect, because it is not given in any amount conditioned upon the payment of the judgment which was rendered in said cause in the Circuit Court for the District of Colorado, and affirmed by the Circuit Court of Appeals of the United States for the Eighth Circuit, said bond being only conditioned for the payment of damages and costs in case said judgment should be affirmed, while, by the statutes of the United States and the rules of this honorable Court, said bond should be given for the whole amount of the judgment or decree, including just damages for delay and costs and interest on appeal.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendants in Error.

IN THE SUPREME COURT OF THE UNITED STATES.

THE UNION PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

ANNA CALLAGHAN AND OTHERS,
Defendants in Error.

Motion to Dismiss the Writ of Error and Affirm the Judgment.

Come now the above named defendants in error and move the Court to dismiss the writ of error heretofore issued out of this Court to the Circuit Court of Appeals of the United States for the Eighth Circuit, and to affirm the judgment of the said Circuit Court of Appeals, for the following reasons, to wit:

First—No bond was taken upon the allowance of said writ of error, in accordance with the provisions of the statute of the United States, concerning the issuing of writs of error.

Second—Because it appears in and by the return of said writ of error that the plaintiff in error has reserved no exception to the judgment of the Circuit Court of Appeals, nor to any opinion rendered by said Circuit Court of Appeals, and there is no bill of exceptions bringing up the proceedings of said Circuit Court of Appeals in said cause.

Third—There is no assignment of error filed with said writ of error which can be considered by this Court except a general assignment that the Court of Appeals erred in affirming the judgment of the Circuit Court,

all the other assignments of error relating to statements contained in the opinion of the said Circuit Court of Appeals, which are no part of the record, and upon which error cannot be assigned, and this Court will not consider any such general assignment.

Fourth—It is manifest, on examination of the record, that said writ of error has been sued out solely for the purpose of delay.

Wherefore, said defendants in error pray that said writ shall be dismissed, and that the judgment rendered by the Circuit Court of Appeals shall be affirmed, and that the defendants in error be given damages and costs for the delay incident to the issuing of said writ of error.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendants in Error.

all the other assignments of error relating to statements contained in the opinion of the said Circuit Court of Appeals, which are no part of the record, and upon which error cannot be assigned, and this Court will not consider any such general assignment.

Fourth—It is manifest, on examination of the record, that said writ of error has been sued out solely for the purpose of delay.

Wherefore, said defendants in error pray that said writ shall be dismissed, and that the judgment rendered by the Circuit Court of Appeals shall be affirmed, and that the defendants in error be given damages and costs for the delay incident to the issuing of said writ of error.

C. S. THOMAS,
W. H. BRYANT,
Attorneys for Defendants in Error.

Office Supreme Court U. S.
FILED.
JAN 22 1896
JAMES H. McKENNEY,
CLERK.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1895.

The Union Pacific Railway Company,
Plaintiff in Error,

vs.

Anna Callaghan and Others,
Defendants in Error.

No. 271.

Brief and Argument of Plaintiff in Error on Motion of Defendant in Error to Vacate the Supersedeas and Dismiss the Writ of Error or Affirm the Judgment.

JOHN F. DILLON,
JOHN M. THURSTON,
Attorneys for Plaintiff in Error.

McGILL & WALLACE, Law Printers, Washington, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNION PACIFIC RAILWAY COMPANY, Plaintiff in Error, *vs.* ANNA CALLAGHAN AND OTHERS, Defendants in Error.	No. 271.

Brief and Argument of Plaintiff in Error on Motion of Defendants in Error to Vacate the Supersedeas and Dismiss the Writ of Error or Affirm the Judgment.

Plaintiff in error submits that the paper filed herein, suggesting death of defendant in error, is entirely insufficient to authorize any revival of the cause in the name of the heirs-at-law of James Callaghan. The said instrument is a mere statement of counsel, unsupported by any evidence tending to show the death of Callaghan, and unaccompanied by any proof that he left surviving him any heirs or next of kin.

Notwithstanding the insufficiency of the showing made, we are not inclined to object to the appearance now made by opposing counsel, and it is immaterial to us for whom they claim to appear, as the case must be heard and determined upon the record and without any

regard to what results may follow should the judgment of the court below be reversed and the cause remanded for a new trial.

We now come to consider the motion to dismiss the writ of error.

I.

It is insisted that the supersedeas bond taken is no bond, because it was not taken in any certain penal sum. It is admitted, however, that the bond as taken is a good cost bond, and if so the writ of error must stand, even if, in fact, there has been no valid supersedeas to the judgment. If opposing counsel are right in their contention, they could have gone on with the enforcement and collection of their judgment notwithstanding the writ of error, the same as if it had been sued out without any attempt to have the writ of error operate as a supersedeas. But we insist that the bond was taken in the language of the statute; it is the form of bond which has been almost universally used, and we believe it is now suggested for the first time that the statutory form is insufficient. Section 1000 of the Revised Statutes of the United States provides:

"That they shall take good and sufficient security, that the plaintiff in error shall prosecute his writ of appeal to effect, and if he fail to make his plea good, shall answer all damages and costs where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

We do not understand that any rule of this court nullifies or changes the above statute of the United States. Under that statute a bond to pay damages unquestionably means those damages which have been established by the judgment from which the writ of error is prosecuted. No case cited upon the other side in any manner

tends to establish any contrary doctrine. The cases cited from this court are cases in which a writ of error was prosecuted to stay a decree or judgment which does not fix amount of damages. Of course, in prosecuting an appeal from a decree of foreclosure, where real property stands as security for enforcement of the decree, the decree would not of itself establish the measure of damages, and the court would be compelled to make an order as to the sum for which supersedeas bond should be given. Or in a criminal case, such as is cited in 156 U. S., 277, the judgment being one directing punishment, it is necessary for the court, in its discretion, to fix the amount of the supersedeas bond; but where the judgment is a simple one for the payment of money only, the judgment itself is the measure of the supersedeas undertaking, and the statutory language is ample to give a cause of action on the bond against the surety for the amount of the judgment and costs.

II.

It is urged that the assignments of error in the record are insufficient under the rules of this court.

Our own understanding of the practice is that the error of the Circuit Court of Appeals in a law cause consists in the act affirming or reversing the judgment of the Circuit Court; and the only assignment of error necessary in this court is the one alleging that the Circuit Court of Appeals erred in affirming or reversing the judgment of the court below. Such must be the rule, for the decision of the Circuit Court of Appeals is indivisible. There may be many different reasons assigned in the opinion of the court, but the only judicial act performed is that of reversing or affirming the judgment of the Circuit Court. Of course it is necessary, when this court comes to consider whether or not there was error in the

judgment, reversing or affirming, to examine the record as it came from the Circuit Court, and to take up and consider each of the errors assigned in that record; but it would be most useless and burdensome to require any other assignment of error upon the prosecution of a writ of error in a cause like the one at bar, except the general allegation that the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court.

III.

Defendant in error moves to dismiss the writ of error and affirm the judgment for the alleged reason that the writ was sued out for the purpose of delay only, and that no substantial error appears in the record of the trial court.

This was an action for personal injury to an employé of the plaintiff in error. The complainant sets forth that the employé was a section foreman employed in repairing tracks upon a branch line from the main line of road on which the injury occurred, the main line extending from Trinidad, Colo., southward to Trinchera, Colo., and beyond—the accident happening at a bridge just north of Trinchera, which bridge had been undermined by a heavy flood, etc., the condition of the bridge being known to the superintendent of the company before the accident. The plaintiff was ordered to join another gang of laborers at Trinidad and proceed toward Trinchera, repairing the road as they went; that in doing so the repair train on which the gang were riding, on approaching a section-house three miles north of the bridge, was flagged by parties in the section-house, and checked its speed, but did not stop, but the conductor in charge signaled the engineer to proceed and he did so, running on to the bridge without stopping, and the bridge going down, the plaintiff and others were injured; that

the accident was caused by carelessness and negligence of the company and of the officers managing the train (fol 9). That the superintendent and roadmaster were reckless, negligent and careless in this, that they failed to take such precautions or order such precautions to be taken by others as would prevent any train from crossing or attempting to cross the said bridge while it was in such dangerous and insecure condition. It also asserted that plaintiff was riding as a passenger, and then says "that said accident resulted and was caused entirely by the negligence, carelessness and recklessness of the said officers of the said company, together with the conductor and engineer in charge of the train on which plaintiff was riding."

The evidence shows clearly (see fol. 29 *et seq.*) that, for several days prior to the day the accident happened, the country south of Trinidad had been deluged with water, no trains having passed over the road for several days, which was well known to all parties. The plaintiff joined the repairing gang at Trinidad, and they were working their way south all night, repairing the road as they went, somebody going ahead of the train to note condition of roadbed, nearly the entire night, the men riding on the train from place to place, and arriving at a section-house, three miles north of the Trinchera bridge, about daylight, and that the track was badly washed out, and had to be repaired in many places. That at or near the said section-house, parties living there signaled engineer to stop, that engineer checked the speed, but did not stop, some one from the caboose having signaled him to proceed, and thereupon it did proceed, without any stops, until the train ran upon the bridge, and went down with it, because the dirt was all washed from under the track at the approach to the bridge, and had left the ties and track hanging in the air; the plaintiff's own witnesses, three in number, two of whom were his brothers,

swearing to the condition of the track, and that it could easily have been seen by the engineer at a distance of about 900 feet before he came to it, and all three of these witnesses giving evidence of the erection of a red flag, the recognized danger signal, at a distance of about 600 to 700 feet above the place where the ties and track were suspended, such flag having been posted in a conspicuous place, and in a place the most likely to attract the attention of the parties operating the train, and in the center of the track, and that the flag used was of the kind and size ordinarily used for that purpose. It was also shown by the plaintiff's witnesses that this condition of the track was easily seen from a hand car six or seven hundred feet before arriving at it, and much more easily and readily seen from the position of the engineer on the train. No evidence was offered as to whether there was or was not any conductor on the train.

The plaintiff gave evidence as to the extent of his injuries, etc., whereupon, at close of plaintiff's testimony, defendant requested an instruction that there was not sufficient testimony to warrant a finding for the plaintiff, which was denied, and the defendant excepted. The defendant introduced evidence tending to show that plaintiff voluntarily placed himself in a dangerous place, when a safe place, to wit, box cars that did not go off the track, had been provided, and all hands, including the plaintiff, having been informed that they were provided for their use, and also introduced in evidence Rule 227 of the rules and regulations of defendant, under which all the parties working on the track or on the train were working, which rule was as follows:

"Rule 227. In case of an extraordinary rain storm or high water, trains must be brought to a stop, and a man sent out to examine bridges, trestles, culverts and other points liable to damage, before passing over. Conductors will make careful inquiry at all stopping places, and

when thought advisable make extra stops to ascertain the extent and severity of storms, taking no risks. In case of doubt as to the safety of proceeding, they will place upon a siding, and remain there until certain it is safe to proceed."

And the court having instructed the jury, and having refused certain instructions asked by defendant, the jury returned a verdict for $4,500; and a motion for a new trial having been overruled, judgment was entered on the verdict, and the defendant assigned the following errors:

1st. Error of the court in refusing to instruct the jury, at close of plaintiff's evidence, that the evidence did not warrant a verdict for plaintiff.

2d. Error in refusing to give instructions asked by the defendant, which will be set forth hereafter.

3d. Error in certain parts of the instructions given, to be noticed and set forth hereafter.

I.

As to the first error, we call attention to the fact that is apparent, viz.: That the complaint was based upon the alleged negligence of the defendant, in that neither the superintendent nor the roadmaster, who knew the condition of the bridge and its approaches, ever gave notice to the repair train men of its dangerous condition (see fols. 4, 9 and 10), although in fol. 10 it is alleged that the injury was received because of such negligence, "together with the conductor and engineer in charge of the train." Taking their allegations together as alleging the cause, it is clear that plaintiff was, on the facts shown in evidence, entitled to no verdict, on the ground that defendant had not specially notified the repair train of

the condition of the bridge, since all parties knew the road was badly washed and they were out to repair it, and both ordinary prudence as well as the rules of the company required every man operating the train or on it to anticipate and prepare against such a condition of things, and so the court properly held that no special duty rested on the company to notify the train men (fol. 53). This leaves nothing but the alleged negligence of "the engineer and conductor" as the cause of his injuries, and as there was and is nowhere in said complaint any act of either of these men that is alleged to have been either negligent or careless, there was in the complaint no allegation of fact, but simply a conclusion of the pleading that these men were negligent. If the negligence of the engineeer caused the accident, he being a fellow-servant with the plaintiff, no verdict could be had, and so the court instructed. If the accident occured by reason of the engineer refusing to obey the rules and regulations of the company, which the evidence shows he was working under, then, and especially if he disregarded a rule that if obeyed would have avoided the result, and more still, if his act in running on to the approaches without stopping. and without obeying either rules or signals enacted or made by the company to prevent such an accident, then we submit the negligence of the engineer is the direct, immediate, efficient and *only* cause of the accident. True, the rules and regulations that enjoined the utmost precaution and stopping, on approaching a bridge under such circumstances as were then existing, was not in when defendant's motion was introduced, but without them, in view of the fact that the road had been badly washed all the way from Trinidad, as shown by the testimony, and they went out to repair it, and that no train had been over the road for three days, no one will question that it was negligence to run thus three miles without stopping, and past flags

without seeing them, and upon a track whose unsafe condition could have been seen by him 900 feet away, and that such negligence in thus neglecting to stop and failing to see the flag and the track was the efficient and immediate cause of the accident. It did not need, and the facts do not admit of, any other cause, acting conjointly with the engineer's negligence. Nor can it be truthfully said that any act of the conductor of the train was the *cause*, or that it united with the engineer's act to *cause* the accident. The only act of the conductor that bears even in the slightest degree upon the question is that the conductor, three miles north of the place of the accident (the train having been flagged, and having checked its speed), gave an order or signal to proceed and did not stop. Now, unless this refusal to stop or signaling of conductor to proceed, was either the sole cause or so united with the undoubted negligence of the engineer as to make the conjoined acts of both the cause, there could be no recovery.

What was the cause of the accident, then, is the real and exact question on this point, and the answer to that involves the doctrine not only of remote and proximate cause, but the question still more difficult to determine, to what extent may one act in a chain or series of acts or events be said to unite or conjoin with other and more immediate acts or events, to make the ultimate, direct and immediate act, the joint act of the immediate and remote actors, so as to make the act, that only gave the occasion for the injury, or made it possible that the injury should be received, the effect and immediate cause. In this case, in the chain of events leading up to the accident is the building and operating the road and the construction of the approaches to the bridge, and coming closer in point of time, and in the nature of the act the equipment and starting of the train. Had the conductor given no order to proceed from Trinidad no accident

could have happened; and equally so had he stopped the train or allowed it to be stopped when flagged, and not started it again. But no one will claim that the starting of the train from Trinidad, under the order of the conductor, or the several subsequent startings of the train or any starting of the train after stopping, was an act of such a character as to conjoin with the engineer's negligence to make the company liable; and it is equally clear that this failure to come to a dead halt, or what is the same thing, the signal to proceed after speed was checked, is of the same character. Suppose he had stopped, and then having been informed that the approaches were washed out, he had signaled the engineer to go on, and the engineer going on, had recklessly and without stopping, run on to the bridge. Would anyone then say the company was liable? Certainly not. If this be true, how can the company be made liable by a refusal to stop, or signaling to proceed without stopping, when all that is claimed the engineer or conductor would have learned by stopping, was a state of affairs that both of them were bound to anticipate and in view of the evidence and the objects for which the train was out, was well known to them. The court found, and rightfully so, that there was no necessity for special notice to the train men of the condition of the bridge, and that the failure of the superintendent to specially notify them was not negligence, and that, too, when the allegation of the complaint really showed that failure thus to notify was the real cause of the accident.

If this notice was not necessary, because, in view of the facts, they were already sufficiently warned, on what ground can it be said that a failure to stop and receive their exact notice or warning from the section men, was negligence? If no notice from one of the company's officers was necessary because they had notice, how is it possible that it was negligence in the train men or the

conductor to fail to stop, when, by stopping, all the section men could do would be to give a warning that the company itself was under no obligations to give? Beside that, it is clear, that since there was nothing to be complained of, either in starting, refusing to stop, or proceeding without stopping, when flagged, except upon the assumption that by stopping, the accident would probably have been avoided. But the theory or assumption has no support except on the presumption, either that some other and different information as to the danger, would have been given at that time if the train had stopped, by which engineer would have been governed, or that a refusal to stop absolved the engineer from observance of the care and caution that the known condition of the track *all* the way down had imposed on him, and the further assumption that the act of the conductor in refusing to stop, and in signaling to proceed, was the act of the company, by which he was thus absolved or released from his obligations to exercise the care required in view of the known dangers. Without such assumptions and presumptions, it is *clear* that nothing can be urged against the conductor's act, and the act itself was but to say: "Yes; we know the danger; we need no further information;" and to the engineer: "Proceed cautiously as is your duty." It was not in the slightest degree negligence in the conductor to refuse to stop or to proceed, if the proceeding had been with such care on part of the engineer, as the circumstances known to him, required. The signal or order not to stop no more absolved the engineer from the obligation imposed by the condition of the road to be cautious and careful than did the order to start from Trinidad.

Again, it is the engineer and not the conductor that controls the train *ex necessitate*, from his post of observation; must control a train as to dangers seen, danger signals, and, hence, a train once started, the conductor is guilty

of no negligence, unless it be shown that he has seen or ought to have seen the danger or danger signals—and there was no pretence of that in the case—and, hence, the failure to make a use of the necessary care, and especially the failure of the engineer to see the flag, which, by the evidence, the company had put out, was the sole, individual negligent act of the engineer and the sole cause of the accident, and the only point in which it in any way conjoined with the acts of the defendant or its conductor was in his starting the train. This obligation thus imposed on the engineer is recognized and made the ground of the decision in

Baltimore & Ohio R. Co. *v.* Andrews, 50 Fed. Rep., 728–731.

Now, as there was no negligence in not stopping, and no evidence whatever of any other negligent act on the part either of the company or the conductor, it is clear that there is here shown no evidence of negligence of the defendant company uniting with the negligence of the engineer in producing the injury, and, hence, the defendant was entitled to the instruction asked and it was error to refuse it.

II.

The second error assigned is in refusing the instructions asked on submission of the case to the jury. It was then in proof that under circumstances like those surrounding the engineer at time and before the accident, and with his knowledge of the facts that numerous washouts had occurred, and to a great extent, he was doubly bound both by his obligation in any case to exercise care and caution, and by the rules not to run upon a bridge or its approaches, without stopping to see that it was safe to do so—to have used such caution as would have certainly prevented the accident—and so, the instructions asked by

the defendant—four in number—and fully set forth (fols. 50 to 53), were in substance, first, that by the evidence, the accident *appeared* to have been caused by the failure of the engineer to observe the rules and regulations of the company under such circumstances, and in that his failure to observe the danger signal, which had been placed where he ought to have seen it. That this was a true statement of what, by the evidence, *appeared* to be the cause of the accident there can be no question, for whatever may be said of some acts of the conductor, uniting with the failure to see the signal, and the failure to stop, whether he saw the signal or not, as the rules required him to do, it is clear beyond any dispute that *but* for his failure to stop at the bridge the accident could not have occurred. So, too, it must be admitted that the presumption is that if he had seen the signal, he would have stopped, and hence it was true, as stated, and it did thus appear to be the result of the engineer's failure to observe the signal, since the court did instruct (fol. 56): "Now, I suppose the red flag was up when the engineer came there, and that he *did not see it, did not look;* and he knew of the bridge, and knew it would be dangerous for him to go upon it."

This instruction, thus given, covers the whole ground, and is consistent with the instruction we asked, and wholly inconsistent with the refusal to instruct as we asked, and still more inconsistent with instruction afterwards given, since founded, as it was, upon undisputed evidence that the danger signal had been put up by the defendant, and put up where it could easily have been seen if the engineer had looked for it, it stated facts that compelled the conclusion that it was the failure to *see* and observe the flag, and the failure to observe the rules, and the failure to observe the caution imposed by the condition of the road, that was the sole cause of the accident.

The second instruction asked for and refused by the court was to the effect that the jury were not at liberty to *infer* that the accident was *caused* by the conductor's signaling the engineer to proceed, since he was still to proceed with caution and stopping in obedience to the rules. And that this is a correct statement of a legal proposition arising in the evidence will not be questioned, and as such, we were entitled to have it given, since this point is nowhere met or covered by the instructions given, and it was of real importance in the case.

The third instruction was to the effect that the mere fact that the accident would not probably have happened if the conductor had stopped at Adair when flagged, affords no ground for holding that the accident happened *because* of such failure to stop, and that it afforded no ground for saying that such failure to stop was the proximate cause of the accident. That this instruction was correct in law and ought to have been given will be discussed further on, in connection with instructions that were given.

The fourth instruction asked and refused was, "That the jury are not at liberty to infer or find from the mere fact that the conductor gave a signal to proceed, after the engineer had slowed up at Adair, that such signal to proceed was the proximate cause of the accident," since such signal was only to proceed in precisely the same manner as the engineer was bound to proceed under the rules and regulations and in view of the facts; and further, that even if the jury did believe the conductor negligent in his signaling, plaintiff would not be entitled to recover, *unless* they further believed that the conductor's negligence was the proximate cause of the accident. This, like the third, will be discussed further on.

We submit that it states correctly propositions of law pertinent to the issue, and which defendants were entitled to have given to the jury.

III.

The third assignment of error is to the instruction given by the court. These instructions were long, and of the errors assigned thereon, we propose to discuss but one, and that one, it will be seen, is in substance and effect, the exact reverse of the propositions stated in the third and fourth instructions refused the defendant, and is as follows:

"Now, I suppose the red flag was up when the engineer came there, and that he did not see it—he did not look; and so, also, he knew of the bridge, and he knew this was a time of danger, and that it would be a dangerous thing for him to go upon it; but if there was negligence on his part, and negligence on the part of the conductor also—both contributing to the result—the company is not exonerated by that circumstance. If it was the negligence of the engineer alone, if the accident came to the plaintiff because of his misconduct alone, then the company will not be liable to plaintiff, because the engineer was in the situation of a fellow-servant; but the conductor is not in that situation; he is in the position of a chief—in the position of principal—having the management of affairs, so far as running of the train is concerned, and his authority over others upon its train is such that his negligence is regarded as the negligence of his principal—the company. So, now, if the negligence of the conductor contributed also to the injury—if the injury was in part due to him—the plaintiff may have his action; but if it was due entirely to the engineer—the locomotiveman on the engine—then plaintiff can not recover."

The objection we make to this instruction is, it leaves the jury to find whether the accident or injury to plaintiff was due entirely to the negligence of the engineer or was due to the negligence of the conductor, acting conjointly with the negligence of the engineer, so as to make the conjoint negligence of both the real negligence of the company, and that negligence the proximate cause of the

injury, while, as a matter of law, the evidence showed, and that, too, without any dispute, denial or conflict, that the sole efficient and sufficient cause of the accident was the negligence of the engineer. We submit, then, that this instruction thus given and the refusal to give the fourth asked by us fairly raises the question: What was the proximate cause of the injury, and was that cause the act of the defendant so as to make defendant liable? In the instruction refused, the proposition was that even if the jury should find it was negligent for the conductor not to stop when signaled, yet plaintiff could not recover except upon the further finding that *such* negligence was the proximate cause of the injury. This was axiomatic, that courts will not look beyond the immediate efficient acting cause when recovery for injuries is sought. This instruction was proper under the evidence. Its refusal was error, and the giving of the instruction, that if the negligence of the conductor contributed also to the injury, if injury was in part due to him, the plaintiff may have his action, was error, and error so evidently and inevitably misleading in its tendency that we think it must cause a reversal of the judgment. The rule of the United States Court is that, if requested, the court must instruct correctly upon every question pertinent to the issue, and it is error to refuse one that contains a correct statement of the law, unless it has already been substantially given.

Thorwegan *v.* King, 111 U. S., 549;
Oneal *v.* Long, 4 Cranch, 60;
Smith *v.* Carrington, 4 Cranch, 62;
Pennock *v.* Dialogue, 2 Pet., 1;
Ex. Co. *v.* Kountze, 8 Wal., 342–353;
Emerson *v.* Hogg, 2 Blatchf., 1–7;
Douglas *v.* M'Allister, 3 Cranch, 298;
Nudd *v.* Burrows, 91 U. S., 426–439;
Ry. Co. *v.* McCarthy, 96 U. S., 258–265.

Even if absolutely correct, and given in such a connection as may have misled the jury, new trial will be granted, and if the evidence is close, the jury should be accurately and clearly instructed.

Reeder *v.* Purdy, 41 Ill., 279;
Price *v.* Mahoney, 24 Iowa, 582;
I. C. R. R. *v.* Maffit, 67 Ill., 431.

And where the instruction may have misled the jury new trial will be granted, unless the record shows affirmatively that appellant was not injured.

Andreas *v.* Ketcham, 77 Ill., 377;
Richardson *v.* McNulty, 24 Cal., 339;
Kelly *v.* Cunningham, 1 Cal., 366.

Now, returning to this instruction given and last above quoted, let us see whether the language is not such as to mislead the jury, "so now, if the negligence of the conductor contributed, also to the injury, if the injury was in *part* due to him, etc., plaintiff may have his action." This language is plain. The question is, what did the jury probably understand from it? What did the jury think was meant by "contributed also to the injury?" What would the jury think was proof necessary to find that the injury was in *part* due to the conductor? We submit that even if the jury had all been lawyers and not laymen, this statement coming from a judge of such known abilities, would, probably, have misled them, since, except for a mental modification and control of the words used, it is not only misleading but wholly erroneous. If we take the word "contribute" in its primary and everyday definition, the one the jury would naturally give to it, it means simply "to have or show in any act or effect, to give or finish a part, to give or present in common with others." Anyone who has read the decisions of the various courts, knows, that not only lay-

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men but lawyers and judges, are constantly mistaking the *occasion* of the accident for the cause; they are constantly mixing up the fact of contribution to an effect, with and substituting it for the cause of the effect, and to suppose that this jury did not do so is to suppose that they were in this very case, more accurate in thought and judgment than the court was in its language. In one sense the conductor did "contribute" to the injury, because had he stopped the train and never started it again, no injury would have been received. By continuing the train in motion and by refusing to stop he furnished the occasion upon which the accident happened. He did thus contribute or have a share in the effect, but nobody will contend that such contribution is what the court meant, though anyone can see that *that is* exactly what the jury probably understood from the word used.

A man walks down a street, an obstruction on one side, wrongfuliy there, compels him to cross to the other side, he is injured by something falling from the roof of a building on that side; that the obstruction in the street "contributed" to the injury can not be denied, that it was the cause of the injury no lawyer will claim. A passenger in a street car is wrongfully put off the car, and while crossing the street, where, but for the wrongful act, he would not have been, he is run over by a runaway horse, the act of putting him off in the street surely contributed to his injury, for but for the act he would have been in the car and unhurt, but it did not *cause* the accident, nor did it *so* contribute as to make any one or anything the cause but the runaway horse. The vice of the instruction is that it probably gave countenance to the argument of plaintiff's counsel, when he said to the jury, "If you believe from the evidence that the accident would not have happened if the conductor had stopped at the signal, then his not stopping was the cause." "If," says the instruction, "the injury was due in

part to him" (the conductor), "the plaintiff may have his action." "Due in part." This is equivalent to saying "occasional in part, or owing to the conductor," but in this view the instruction is wrong; the idea expressed is wrong. It is not true that because an effect may be occasioned by or owing to another act or thing that the latter is the cause of that effect. To say a thing is owing to or occasioned by another, is but saying that by this other happening it has been made possible, that the real effective cause could operate; it has given *opportunity* or occasion, in time and place, for the cause to produce its effect. This language was eminently calculated to mislead, and it certainly did mislead the jury.

Again, the idea which pervades and is expressed in that clause of its instruction last quoted is erroneous. It is, that contribution to the injury of the kind shown by the evidence, a contribution which in and of itself could never have caused the accident, one which, at the most, only rendered the accident possible, and was the mere occasion thereof, was sufficient to render the company liable, though the evidence was undenied and undeniable that the accident happened as the direct, immediate, natural and necessary result of the carelessness of the engineer, the company having done its full duty in warning the engineer. That a corporation may be held liable for injuries received by a fellow-servant, owing to the acts of another employé of the same company, when the one actor stands in the place and represents the company, was decided in the Ross case (112 U. S., 377), by a divided court. But this was a case where there was no question but that the negligence of the conductor was the sole and proximate cause of the injury—and the negligent act of the conductor was in respect to a matter which, by reason, first, of his general duties, and, secondly, by reason of the rules and regulations of the company he was bound to do, and failed to do—in substance that

decision was that the company ran its trains under charge of a conductor, and that the company owed it to all its employés to use ordinary care to prevent collision of trains, and that care required *it* to notify the engineer of the situation or approach of another train, with which it was liable to collide. The *conductor* knew, and the company *knew*, the fact that a gravel train was on the track, and the rules made it the duty of the conductor to read his orders, which were to avoid the gravel train, to the engineer, and this he failed to do. The company knew the facts, and was bound to avoid the accident, and it did not do it, and was held liable; but that case holds to nothing that militates against our position in this case, for then the negligence of the conductor—which was the negligence of the company—produced, or caused, the injury. Here the negligence of conductor—if negligence there was—did not cause the injury, was but incidental to it, and was, at the best, only the occasion of it, for which the company was no more liable than for its starting the train from Trinidad.

It is true, there is the case of the Grand T. Ry. Co. *v.* Cummings (106 U. S., 700), in which the language of the court is similar to the language of the instructions under consideration; but we venture the assertion that it is the only case to be found anywhere, unless founded on the case that has stated the doctrine in that way, and if we look carefully at that case, it will be seen that it was used in respect to a state of facts identical in effect with that of the Ross case. The principle underlying both the Cummings and the Ross case is simply that since the company runs the train, through and by employés, and since the duty of the company is to so run them, to prevent a collision of trains, and that ordinary care used by it should prevent collision, and in the Cummings case it was held that if the company's negligence in that respect contributed to the injury, the company was liable,

even though the negligence of a fellow-servant also contributed to it. But the kind of contribution spoken of in that case, is not the kind of combination shown in evidence in this case, if, indeed, there was in this case any contribution, for the court says: "If the negligence of the company contributed to, it must *necessarily have been* an *immediate cause* of the *accident*, and it is no defense that another was likewise guilty of wrong."

The contribution *to*, in this case was of such a character as *would* without the negligence of anybody else have caused the accident, it was a contribution of the immediate and proximate cause of the accident, and right there, we submit, is to be found the *sine qua non*, in this matter of contribution, in order to hold defendant liable for contributing to an accident, it must be such a contribution as would in, and of itself, without the act of the other party, have been sufficient to cause the accident. In one sense, no accident ever happens without the contribution thereto of many persons, but in a legal sense, no one is liable for contribution, except such action as by their action *cause* the accident.

In the case at bar the only act of the conductor or the company complained of is the signaling the engineer to proceed or not to stop. Now, no man will claim that the accident happened because of that, much less, that the accident was the natural or the necessary sequel or result of failing to stop, nor will it be claimed even that such a result could reasonably have been anticipated; and nobody will deny that, between this act of the conductor, whatever its nature may be, there did intervene a cause, acting wholly independent of this act, and wholly independent of the conductor, that was an efficient, sufficient and immediate, and hence, the proximate cause of the injury. No matter what the contribution by the conductor was, the real cause was the negligence of the engineer, and there is no proof nor ground even of

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presumption, that the failure to stop in the least affected the question of the engineer's negligence.

Let us notice now what the Supreme Court of the United States holds on this subject of proximate cause.

In Ins. Co. *v.* Boon (95 U. S., 130), the court says: "The proximate cause is the efficient cause, the one which necessarily sets the other causes in motion. The causes which are truly incidental or instruments of a superior agency are not the proximate causes. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

That is exactly the condition of affairs in this case.

In Ins. Co. *v.* Tweed (7 Wall., 52), the same doctrine is asserted, by holding that if a new force has intervened, of *itself sufficient* to stand as the cause of the misfortune, the other must be considered too remote. In that case an explosion, quite remote in point of place and time, was held to be the *cause* of a loss by fire, because the explosion *produced and set in operation* the fire, and the explosion was a *causa causans* operating naturally and necessarily to produce the loss.

In Milwaukee, etc., Ry. Co. *v.* Kellogg (94 U. S., 475), the court says: "It is generally held that to warrant a finding that negligence is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence, and that it ought to have been foreseen," etc., and then adds: "We do not say that even the material and probable consequences of a wrongful act are, in all cases, to be chargeable to misfeasance or non-feasance; they are not when there is a sufficient independent cause operating between the wrong and the injury." In Booth *v.* Kent (19 Johns., 228), "that in tort the damage, in respect to which plaintiff proceeds, must be the legal and natural consequence of the act imputed to the defendant."

"An act is the proximate cause of an event when, in the natural order of things, it would necessarily produce that event—when it is the first and direct power producing the result, the *causa causans* of the schoolroom."
Beach on Con. Neg., Sec. 10.

"The cause of an event is the sum total of the contingencies of every description, which being realized, the event invariably follows. Ordinarily, that condition is termed the cause whose share in the matter is the most conspicuous and is most immediately preceding and proximate to the event."
Moulton *v.* Sanford, 51 Me., 134.

This definition has been approved in—
Sutton *v.* Wauwatosa, 29 Wis., 21;
Lewes *v.* Flint, etc., Ry. Co., 54 Mich., 55.

From all this, we assert that a proximate cause for which recovery can be had, is one acting at the time and directly, mediately to produce the effect, not necessarily alone but in connection with other causes there and then operating and more or less remote, may, perhaps, all of which, in a sense, have contributed to the result.

In case at bar, to bring *about* the occasion for, and to make the accident possible, the train, with its conductor, the engineer, with his locomotive, the flood requiring repairs to the roadbed, the presence and running of the train were all contributory to the result, but neither one nor all of them was the cause. The evident efficient operating cause was the negligent running upon the bridge, this and this alone, was *the* cause. All and every other negligence may be, must be, ignored, because here is an efficient intervening cause, which must stand as the cause of the disaster, and it matters not whether the act of the conductor were or were not negligent, since the accident did not happen because of his negligence or that of the company.

In Sheffer *v.* R. R. Co. (105 U. S., 240), a collision of trains had resulted in rendering deceased insane, and eight months after he committed suicide. His executors sued the railroad, through whose negligence he became insane, for damages arising out of his death, averring that the collision was the proximate cause of his death, because it brought on insanity, and he lost his reasoning powers, etc., but the court held that the proximate cause of his death was his own suicidal act. Now, it can not be denied that there is certainly, in that case, evidence which clearly showed that the collision probably did contribute to the result, and the evidence is much stronger than in this case, yet though the collision was admitted to be the result of defendant's negligence (the case being heard on demurrer), yet a proximate cause being found, the disaster was attributed to it, and to it alone. In that case, too, the court says, the case of Ins. Co. *v.* Tweed, went to the verge of sound doctrine, and the explosion was held the proximate cause, because no other proximate cause was found. It says the suicide was not a natural and reasonably to be expected result from the injury on the train, but that both it and the insanity were casual and unexpected, and so in case at bar, nobody would reasonably or naturally expect that one engineer who knew the dangers of the road, who knew the rules made to avoid dangers, and who could have seen the flags posted to warn him anew, of the danger, would because the conductor refused to stop, run on to a bridge which he had every reason to believe was dangerous, and certainly, unless this could or ought to have been reasonably anticipated, the act of the conductor did not, in a judicial sense, contribute to the result, so as to make the act of the engineer the act of the company.

In Henry *v.* St. L. R. R. (76 Mo., 288), the plaintiff was wrongfully ordered out of a caboose by defendant, and he got out, and in doing so stepped upon track and

was run over by the cars. Now, it can not be questioned that the defendant, by driving plaintiff out of the caboose, contributed to the injury, but the court held the getting on the track was the proximate cause, and defendant not liable.

To the same effect is—

Dubuque, etc., *v.* Dubuque, 30 Iowa, 176;

and—

Bosch *v.* B. & M. R. R. Co., 44 Iowa, 402.

In Haley *v.* C. & N. W. R. R. (21 Iowa, 25), it is said: "In the use of words, proximate cause, is meant negligence occurring at the time the injury happened," and it proceeds to say that in case of contributory negligence, if the contributory negligence is remote, and that of defendant proximate, recovery can be had, but if the contributory negligence is proximate, and defendant's remote, no recovery can be had. We submit that this doctrine is applicable to case at bar, and if defendant was negligent, which we deny, yet it was so remote, and the engineer's negligence so proximate that no recovery can be had. It should be kept in mind that in every case a defendant is answerable for the consequences of negligence, not because of the abstract existence of negligence.

Hart *v.* Allen and Grant, 2 Watts, 116.

Failure to ring bells, give signals, check speed of trains, running recklessly, etc., although grossly negligent, gives no right of action, except upon allegation and proof of injury as the natural and legitimate result of such negligence. So here, if negligence was shown to have existed when the conductor refused to stop, yet it could not have produced the result complained of, except for the all-sufficient negligence of the engineer. In giving orders to run a train, in refusing to stop a train.

in stopping and starting, the company, and the conductor as well, must be allowed to act on the presumption that the servant, whose business it is to control the locomotive and look out for danger, will not only be careful, as it is his duty to be, but will obey the rules which require him to observe signals, and stop before going upon a bridge, under the circumstances existing at that time.

"To constitute actionable negligence, there must be not only a connection between the negligence complained of and the injury suffered, but that connection must be by a natural, unbroken sequence, without intervening or efficient cause; so that, *but* for the negligence complained of, the injury would not have happened—it must be the direct, immediate, efficient cause of the injury."

Shearm. & Redf. on Neg., Sec. 26;
Hoag *v.* L. S. R. R., 85 Pa. St., 298;
Penn. R. R. *v.* Hope, 80 Pa., 373.

So, the Supreme court, in 94 U. S., 475, *supra*, says:

"It is admitted that the rule is difficult of application, but it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances."

Now, when two or more causes unite, or act separately and the inquiry is what was, or which one was the cause, the question is answered by the application of the rule just quoted, and the answer is that cause which acting ordinarily in a natural way would have produced the effect, and if such a cause is discovered, and especially if it is nearest in time, and closest, or most immediate in action to the injury, such an one is the real, proximate cause. So here, if it be admitted that the conductor was negligent in not stopping, and the inquiry is what was the proxi-

mate cause, the answer is inevitable—the act of the engineer, because such an act, failing to see danger signal, where danger was signaled, running on to a bridge withous stopping, when in the light of attending circumstances, the engineer knew there was probable danger, was one that, in the natural order of things, was sure to result, as it did, in disaster; and having thus discovered, the proximate, real, efficient cause, why should the inquiry go any further? Nobody claims that the act of the conductor in not stopping would probably result in disaster, or that the accident or inquiry was either a natural or probable consequence of the conductor's act, and hence it was *not* a cause either remote or proximate; since it is a confusion of ideas to say that an act like that of the conductor, having no probabilities of resulting disastrously, may yet be held to unite with the act of the engineer, which act was said to bring disaster, without the contribution of the conductor, because *one* cause of the kind, affirmed by the act of the engineer, is sufficient, it is that intervening, independent cause which breaks all connection of cause and effect that has preceded it, and which the courts invariably say is the real cause, on account of which alone an action may be had.

Lastly, we submit, that under the evidence, the court was not at liberty to submit to the jury any question of the defendant's liability. There was *no* dispute whatever about the facts which bore on the question of the defendant's negligence, to wit, the condition of the road, the knowledge of the engineer, and the knowledge of the defendant of such condition, the sole act of the conductor in his refusal to stop at Adair, three miles from place of accident, the condition of the approaches to the bridge, and the erection of the danger signals, and the rate at which train was run on the bridge. There was, as to these facts, no dispute or conflict of testimony, and that being so, what was the proximate cause, was a question of law,

and to submit it to a jury, to find what was the cause, was error.

This position, we think, is in consonance with the weight of authority and the reason of the thing. Where there is no dispute about the facts the court must determine the question of proximate cause.

West M. T. *v.* Watson, 112 Pa. St., 574;
West M. T. *v.* Watson, 116 Pa. St., 354.

In Hoag *v.* R. R., 85 Pa. St., 203, the court says: "When the facts are undisputed, and the intervening agency is manifest, it is not error for the court to withhold the evidence from the jury." The converse of that must be true—it is error for the court to refer the matter in such a case to the jury.

In S. S. P. Ry. *v.* Trich, 117 Pa. St., 390, plaintiff was on rear platform, and about to enter the car, when driver whipped up to avoid collision with a runaway horse. The jolt threw plaintiff on the ground, when she was struck by the runaway horse and injured. In that case, the court refused to discuss the question of contribution by the defendant's driver, but said, the fact being undisputed, the injury came from the horse, over which defendant had no control, the court, and not the jury, must pass on question of proximate cause, and it was held that the horse was the cause, because (p. 389) it was neither a natural or probable consequence of a person being on the street that he would be struck by a horse.

In Pike *v.* Grand T. Ry. Co., 39 F. R., 258, a fire had been set by defendant's locomotive, which plaintiff's intestate had reason to fear might reach and destroy a house in which plaintiff and plaintiff's intestate lived, and she, therefore, proceeded toward the fire, a distance of fifty rods, and tried to extinguish it, and was burned in the attempt, so that she died. On proof of these facts, the court granted a nonsuit on motion of defendants,

because the fire was not the proximate cause. Here, too, the defendant's "contribution" to the result is undoubted.

In Schaffer *v.* R. R. Co., 249, the facts being undisputed, the court found what the proximate cause of the injury was.

It can hardly be claimed, and it certainly was not claimed at the trial, by court or counsel, that the act of the conductor was, or could have been, *a* proximate cause of the injury, but even if the facts had been such as to show it was a proximate cause, yet the court's instruction would still have been erroneous, for the reason that "where several proximate causes contribute to an accident, and each is an efficient cause, without which the accident would not have happened, it may be attributed to all or any of them, but it can not be attributed to a cause *unless* without its operation the accident would not have happened."

Ring *v.* City of Cohoes, 77 N. Y., 90.

And *a fortiori* if the "contribution" does not amount to the finding of a proximate cause, such contribution is not to have a greater effect than if it had been a cause of the injury. In other words, when a cause is found acting directly, efficiently and immediately to produce disaster, and when the operation of this cause would naturally and ordinarily have caused the injury, without the contribution of other causes, then the former must be held the proximate cause, because it is so independent of the others that it would have produced the effect with or without the existence of the others, or with or without their contribution to it, and these are exactly the facts in this case.

We submit the judgment should be reversed.

JOHN F. DILLON,
JOHN M. THURSTON,
Attorneys for Plaintiff in Error.

No. 668
Metcom
Collection
lb. 13 3/4

OMAHA
AND
ENVIRONS
CORRECTED TO DATE AND ISSUED FOR
J. M. WOLFE & CO'S. CITY DIRECTORY
OMAHA
1889.

W. G. ALBRIGHT & CO.
REAL ESTATE
218 SOUTH 15TH STREET.
Omaha, Neb.
FOREST LAWN CEMETERY
TELEPHONE 785.
"ALBRIGHT'S CHOICE"
W. G. ALBRIGHT. A. H. COOLEY.

Exhibit 15.

No 668
Nixon
vs
Patterson

OMAHA
AND
ENVIRONS
CORRECTED TO DATE AND ISSUED FOR
J. M. WOLFE & CO'S CITY DIRECTORY
OF OMAHA
1889.

MISSOURI RIVER

WOODLAWN

B&M PARK

POTTER & COBB

SEYMOUR PARK

Union Stock Yards

County Road

FREMONT, ELKHORN & MISSOURI VALLEY R.R.

Burlington & Missouri R.R. Sta

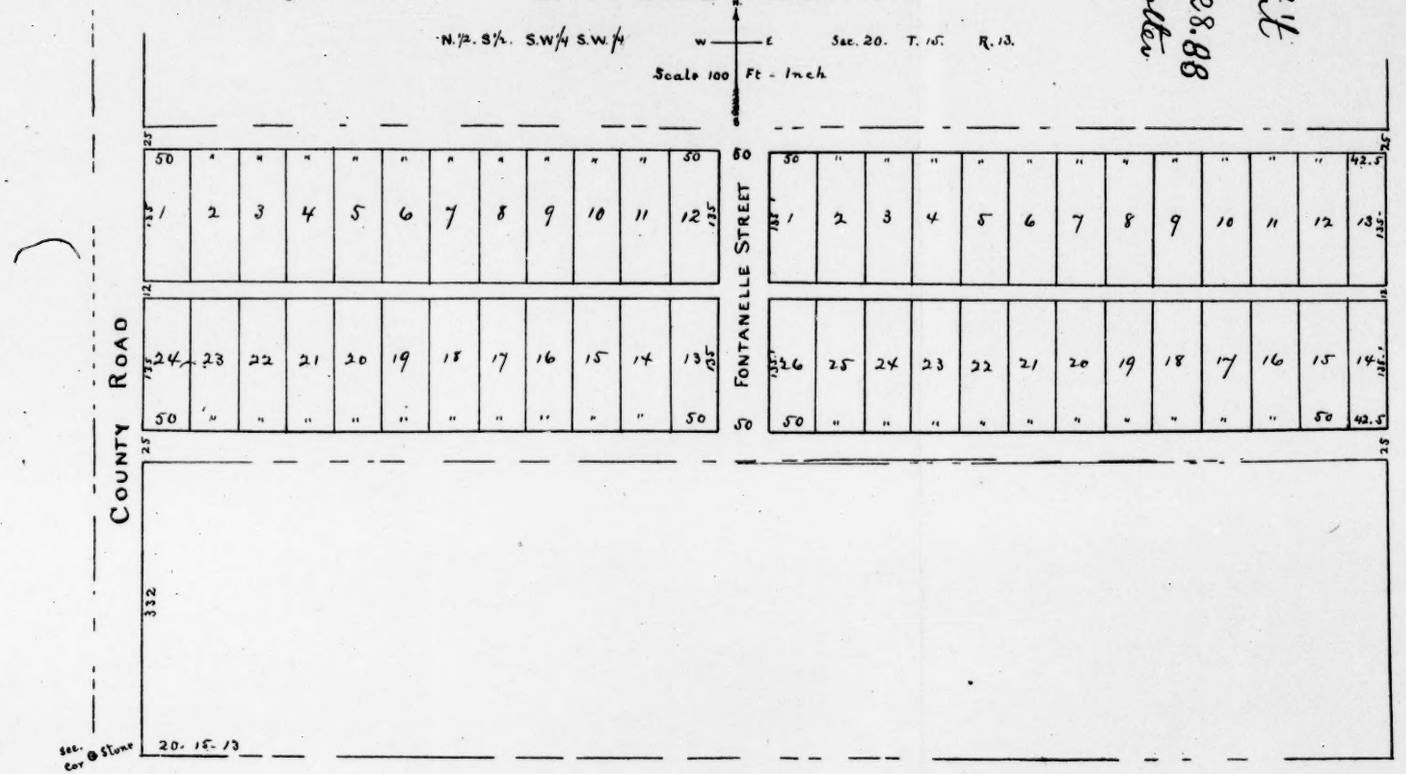
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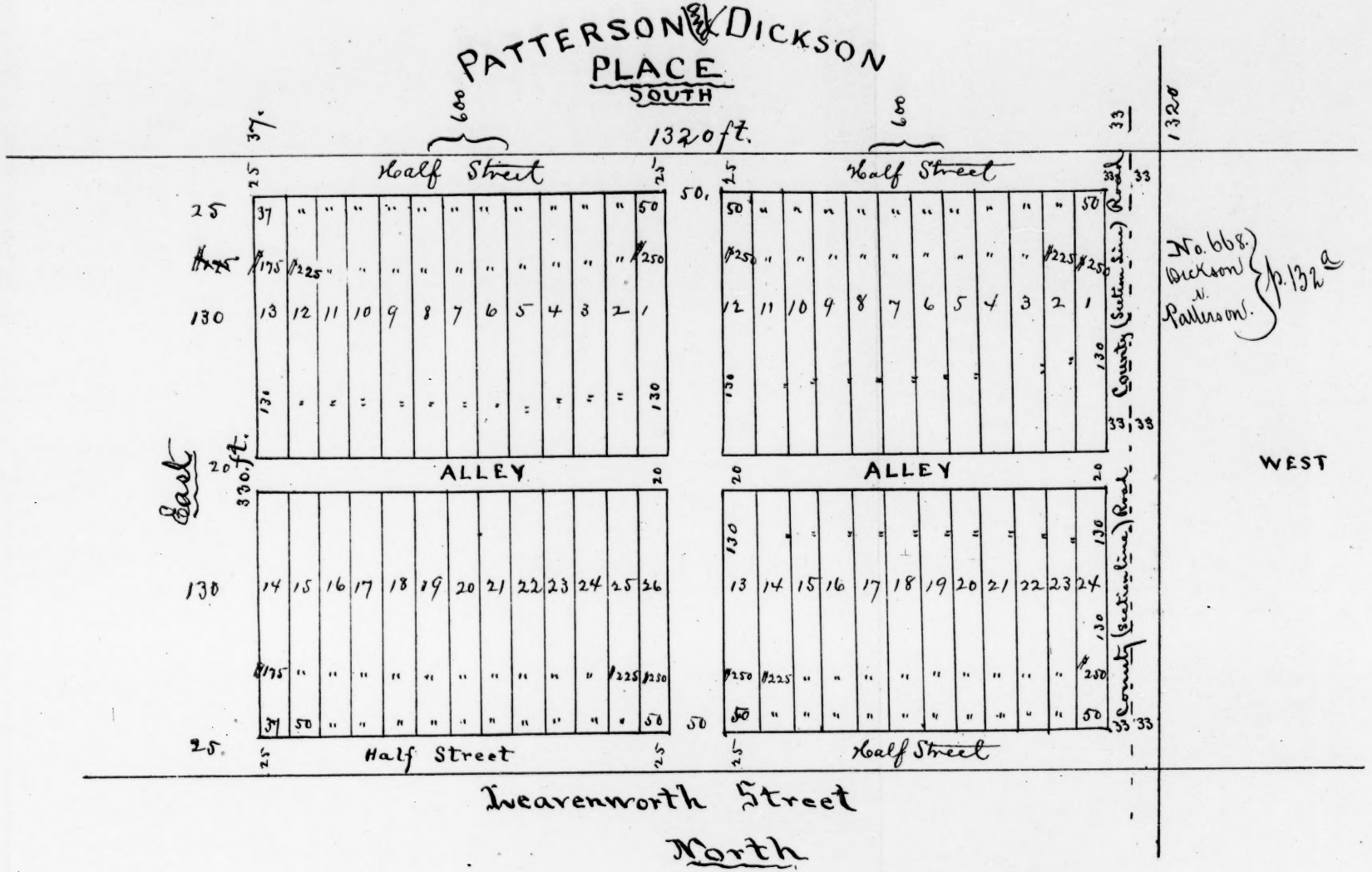
No. 1868
Dickson
Patterson
} p 13 9 1/2

EAST SIDE ADDITION

N. 1/2. S 1/2. S.W 1/4 S.W. 1/4 — Sec. 20. T. 15. R. 13.

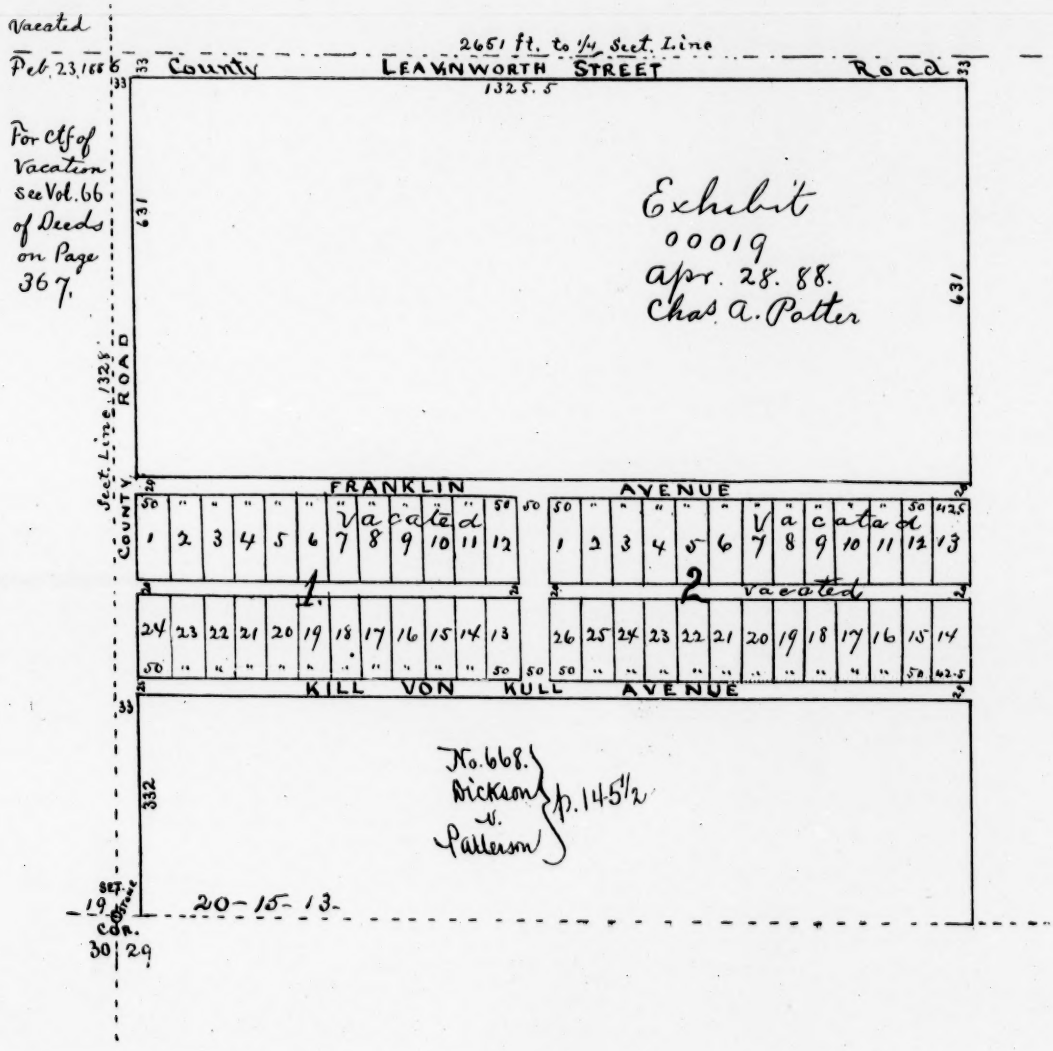
Scale 100 Ft - Inch




PATTERSON & DICKSON
PLACE
SOUTH
1320 ft.
600
600
Half Street
Half Street
ALLEY
ALLEY
Half Street
Half Street
330 ft.
East
WEST
Weavenworth Street
North
No. 668.
Dickson
v.
Patterson.
p. 132a

8 PATTERSON AND DICKSON PLACE

N½ S½ S.W.¼ S.W.¼ Sect. 20. T. 15. N. R. 13.



No. 311,647. Patented Feb. 3, 1885.

Witnesses:
[illegible]
[illegible]

Inventor
Geo. A. Schlick
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Attorneys

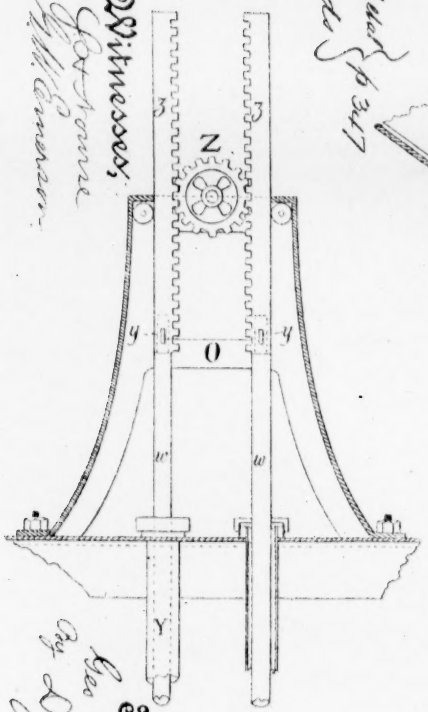


Fig. 13.

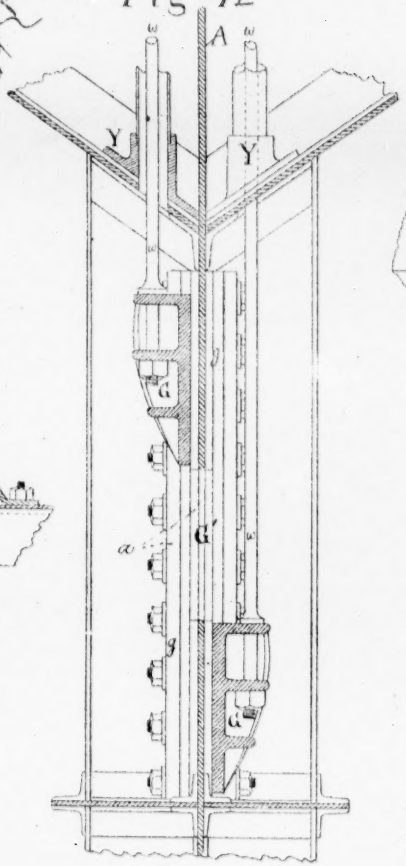


Fig. 12.

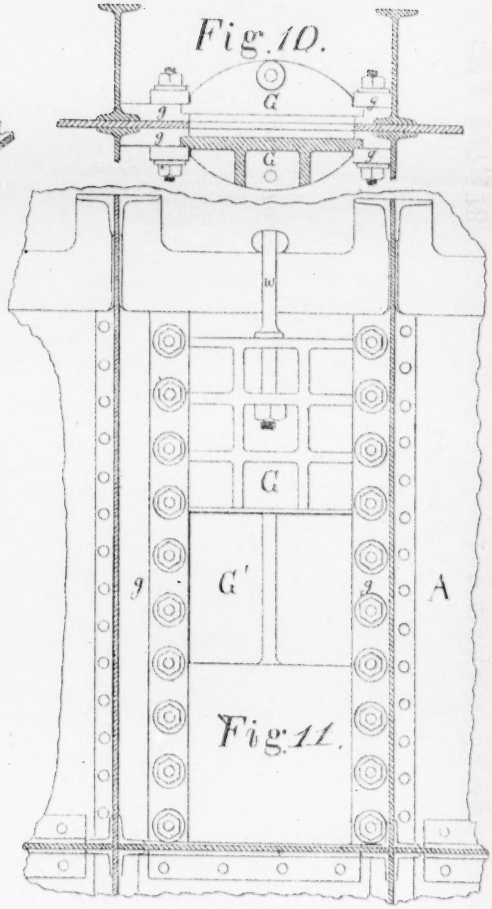
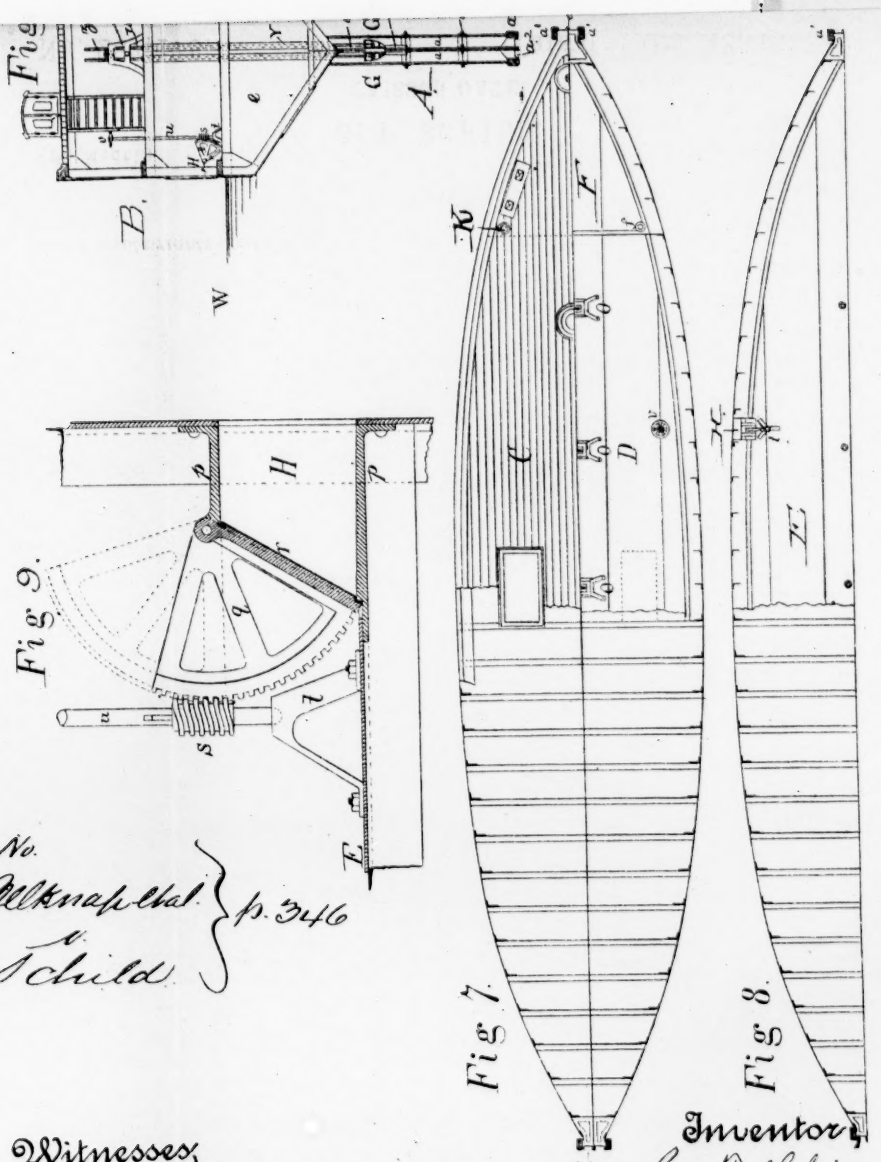


Fig. 10.

Fig. 11.



No. 211,942 Patented Feb. 4, 1879. p. 346

G. Schild.

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G. W. Emerson

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Attorneys

No. Belknap et al. v. Schild } p. 345

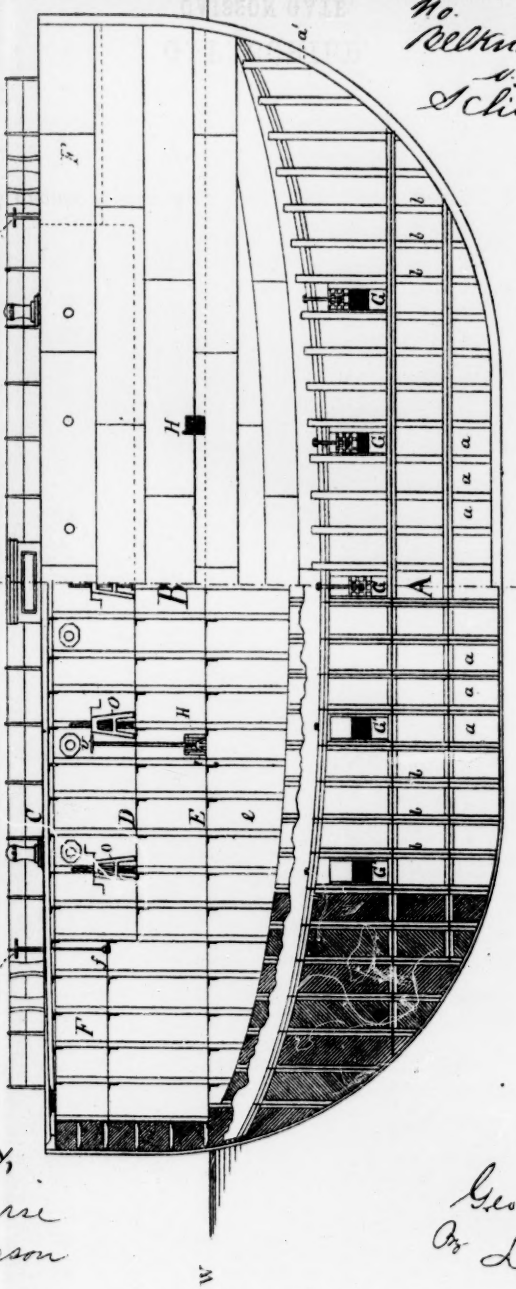


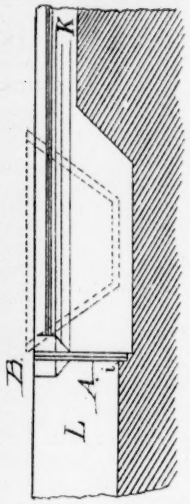
Fig 5

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No. 287,178. Patented Oct. 23, 1883.

Fig 2.



Bellknap et al
v.
Schild
p. 344

Fig 4.

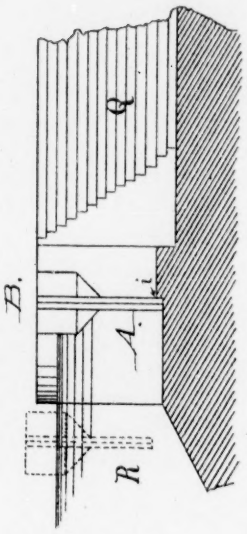


Fig 1.

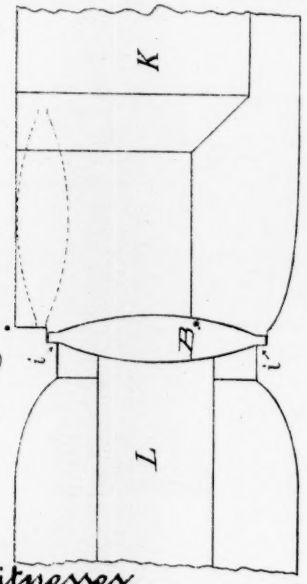
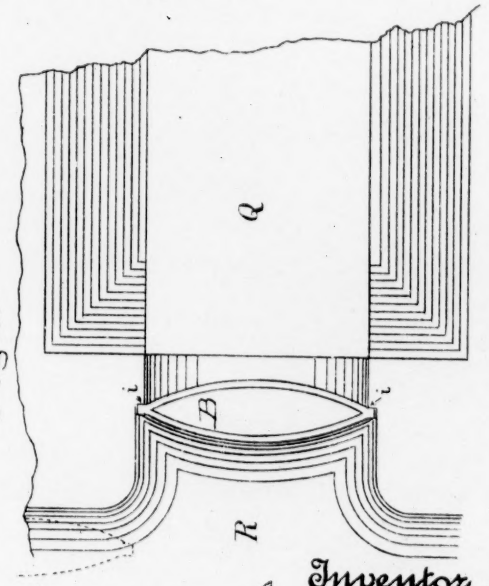


Fig 3.



Witnesses,
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W. W. Emerson

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Attorneys